Supreme Court, U.S.
FILED
Jan 9, 198
DEC 9 1980
MICHAEL RODAK, JR., CLERK

80-1146

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RONALD M. ZOBEL and PATRICIA L. ZOBEL,

Appellants,

v.

THOMAS WILLIAMS, Commissioner of Revenue, and STATE OF ALASKA,

Appellees.

ON APPEAL FROM THE SUPREME COURT FOR THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

MARK A. SANDBERG
CAMAROT, SANDBERG & HUNTER
310 "K" Street, Suite 408
Anchorage, Alaska 99501
Counsel for Appellants.

January, 1981

Washington, D.C. • THIEL PRESS • (202) 638-4521

THE CONSTITUTIONAL QUESTIONS PRESENTED

1. May a State, for any purpose, impose a cumulative open-ended durational residency requirement so that new residents never achieve equal treatment with other residents who arrived earlier?

2. May a State impose an unlimited and perpetual durational residency requirement in conferring economic advantage or benefits?

3. May a State distribute shares in its oil, gas and mineral revenues, including Federal lease and bonus revenues, based upon the recipient's duration of residency viewed retrospectively to Statehood?

4. Can compliance with the demands of the Fourteenth Amendment be determined by forecasting a lifetime of potential effects which, if they actually do occur, might tend to minimize a present disparity of treatment?

5. Is there a violation of State citizenship, as secured by the Fourteenth Amendment, where a durational residency classification is used not as a test of the *bona fides* of a claim of State citizenship but rather as a device to perpetually deny equal treatment to new residents?

TABLE OF CONTENTS

Page

THE CONSTITUTIONAL QUESTIONS PRESENTED ..... (i)
OPINIONS BELOW 1
JURISDICTION OF THIS COURT 2
CONSTITUTIONAL PROVISIONS AND STATUTES 2
STATEMENT OF THE CASE 3
THE QUESTIONS ARE SUBSTANTIAL 5
CONCLUSION 13
APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978) 9
Brown v. Anderson, 202 F. Supp. 96 (D. Alas. 1962) 12
Chimento v. Stark, 353 F.Supp. 1211 (D.N.H.), *aff'd* 414 U.S. 802 (1973) 5
Cole v. Housing Authority of City of Newport, 435 F.2d 807 (1st Cir. 1970) 10
Dunn v. Blumstein, 405 U.S. 330 (1972) 5, 6, 13
Hicklin v. Orbeck, 565 P.2d 159 (Alas. 1977) *rev'd* 437 U.S. 518 (1978) 12
Lynden Transport, Inc. v. State, 532 P.2d 700 (Alas. 1975) 12
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 5, 8, 9, 13
Mullaney v. Anderson, 342 U.S. 415 (1952) 12
Rivera v. Dunn, 329 F. Supp. 554 (D. Conn. 1971) *aff'd*, 404 U.S. 1054 (1972) 9

Cases, continued: *Page*

Shapiro v. Thompson, 394 U.S. 618 (1969) 5, 6, 8, 9, 10, 11, 13

Sosna v. Iowa, 419 U.S. 393 (1975) 5, 6, 13

Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970) *aff'd*, 401 U.S. 985 (1971) 5

State v. Wylie, 516 P.2d 142 (Alas. 1973) 12

Thomas v. Bailey, 595 P.2d 1 (Alas. 1979) 12

Vlandis v. Kline, 412 U.S. 441 (1973) 6, 10

Williams v. Zobel, No. 2170 (Alas., Sept. 19, 1980) . . . 7, 10, 12

Williams v. Zobel, No. 2201 (Alas., Oct. 24, 1980) . . 1, 6, 10, 11

Constitutional Provisions:

Section 1, Amendment XIV, Constitution of the United States 3

Article IX, Section 15 of the Alaska Constitution 2

Statutes and Regulations:

A.S. 43.23.010 – .100 3

28 U.S.C. § 1257(2) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

RONALD M. ZOBEL and PATRICIA L. ZOBEL,

Appellants,

v.

THOMAS WILLIAMS, Commissioner of Revenue, and STATE OF ALASKA,

Appellees.

ON APPEAL FROM THE SUPREME COURT FOR THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Superior Court is not published. The Alaska Supreme Court has written two opinions in this case. The first of these, concerning a legislative scheme to exempt long-term taxpayers from the personal income tax is, reported as *Williams v. Zobel,* No. 2170 (Alas., Sept. 19, 1980). The second opinion, which concerned the statute at issue here, is reported as *Williams v. Zobel*, No. 2201 (Alas., Oct. 24, 1980). Neither of those opinions is yet published in the official reporter.

JURISDICTION OF THIS COURT

This an appeal from a decision of the Alaska Supreme Court declaring a statute which distributes money earned by Alaska's Permanent Fund solely on the basis of durational residency to be constitutional. This statute was challenged by the appellants on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the constitutionally protected right to interstate migration. This challenge was rejected by the Alaska Supreme Court in a judgment issued on October 24, 1980. Appellants filed a Notice of Appeal to this Court in the Alaska Supreme Court on October 28, 1980.

Appellants moved the Alaska Supreme Court for a stay of its own mandate in this case on October 28, 1980. This application was denied on the same day. Appellants then applied to the Honorable Justice William Rehnquist for a stay of the mandate of the Alaska Supreme Court. Justice Rehnquist ordered the mandate stayed on November 3, 1980. On November 17, 1980, the full Court stayed the mandate of the Alaska Supreme Court pending timely filing and disposition of this appeal.

This Court has jurisdiction under 28 U.S.C. §1257(2) to hear this appeal.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Alaska Permanent Fund was established by Article IX, Section 15 of the Alaska Constitution. A copy of that constitutional provision is in the Appendix. The Permanent Fund Dividend distribution statute which is the subject of this appeal appears at

A.S. 43.23.010 – .100. A copy of those statutory provisions is included in the Appendix.

The appellants contend that the distribution statute offends Section I of the Fourteenth Amendment of the United States Constitution which states the following:

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The tremendous oil and mineral wealth bestowed upon Alaska has created a situation which the Alaska Supreme Court has labelled "unique." Faced with surplus revenues far in excess of amounts needed for ordinary governmental functions, the State has established a Permanent Fund. At least twenty-five percent of all mineral lease revenues, royalties, royalty sale proceeds and federal mineral revenue sharing payments and bonuses are placed into the fund. The provisions establishing the fund appear in the Appendix.

By a statute passed on April 15, 1980, A.S. 43.23.010 – .100 the State has proposed to give away one-half of the earnings of that fund to its citizenry. The amount which any Alaska resident receives will be solely and directly tied to the duration of his or her residency. No criterion other than duration of residency

is utilized in assessing the size of the distribution which each resident will receive. The statute has retrospective effect back to the year 1959. The relevant statutory provisions appear in the Appendix.

The Alaska Department of Revenue estimates that distributions from the Fund during the year 1980 will total one hundred and thirty million dollars ($130,000,000.00). A similar amount is projected to be distributed to the citizenry, based on duration of their residency, in 1981. The Department of Revenue has estimated that the yearly gross distribution by the year 1986 will approach one-half of one billion dollars.

Appellants, residents of the State of Alaska since 1978, filed suit in the Superior Court for the Third Judicial District of the State of Alaska seeking, among other things, a declaration that distribution of State assets to the citizenry based solely on the duration of their residency violated the Fourteenth Amendment of the United States Constitution. The Superior Court Judge agreed that the plan was unconstitutional and entered judgment on June 30, 1980 in favor of the Appellants. No distributions pursuant to the plan had taken place at that time and any prospective distributions were enjoined.

An appeal to the Supreme Court of the State of Alaska followed. On October 24, 1980, the Alaska Supreme Court issued an opinion declaring that the judgment of the lower Court was reversed. The Court split three to two on the question. On November 17, 1980, this Court stayed the mandate of the Alaska Supreme Court pending disposition of this appeal.

THE QUESTIONS ARE SUBSTANTIAL

1. Aside from the governmental office category,[1] this Court has never approved a durational residency requirement in excess of one year.[2] The Court has found a number of one year durational residency requirements to be inconsistent with the right to equal protection and the right of interstate migration. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). This Court has never been presented with a durational residency requirement that creates a perpetual disparity in treatment between the citizens of a State solely on the basis of length of residency.

The statute which is before this Court imposes a twenty-one year durational residency requirement to attain maximum benefits from the distribution plan in 1980. In 1981 it will impose a twenty-two year requirement. By the year 2000, Alaskans will be divided into forty-one classes of citizens based upon the date they moved to or were born in Alaska. The terms of the durational residency requirement imposed by this statute are unprecedented in the American law. This statute imposes a more extreme durational residency requirement than any case which has ever come to this Court.

---

[1] This Court has summarily affirmed without opinion the requirement that a person must be a citizen of New Hampshire for seven years for eligibility to run for Governor. *Chimento v. Stark*, 353 F.Supp. 1211 (D.N.H.), *aff'd* 414 U.S. 802 (1973).

[2] *Sosna v. Iowa*, 419 U.S. 393 (1975) (one year for divorce); *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn. 1970) *aff'd*, 401 U.S. 985 (1971) (one year for reduced State university tuition).

A benefit denied one year will not be provided in the next year or at any time in the future. An Alaska citizen denied a benefit because of durational residency is always denied the maximum benefit received by other Alaska citizens. The new resident never attains equality with the person who came here before him.

The decisions of this Court dealing with durational residency requirements establish that such requirements are constitutionally permissible in only certain cases, either as an element of proof that one is a *bona fide* resident, *Vlandis v. Kline*, 412 U.S. 441, 453 (1973), or to protect a State in the exercise of its domestic relations jurisdiction. *Sosna v. Iowa*, 419 U.S. 393, 406-09 (1975). The dissent below noted that it has never been questioned that durational residency requirements must be reasonable in length and that, once the minimum or threshold requirement has been satisfied, all citizens must be treated equally. It cited the opinions of numerous present or former Justices of this Court for the proposition that durational residency requirements, when permissible, must be in the nature of a reasonable, finite threshold requirement. No. 2201, Slip Op. at 52-53 (Dimond, J. dissenting). *See Vlandis v. Kline*, 412 U.S. at 452; *Dunn v. Blumstein*, 405 U.S. 330, 363 (1972) (Burger, C. J. dissenting) (approving reasonable periods); *Shapiro v. Thompson*, 394 U.S. 618, 644, 646, 648 (1969) (Warren, C. J. dissenting) (approving minimal residency requirements); 394 U.S. at 677 (Harlan, J., dissenting) (approving residency requirements that are not excessive).

The plan which is before the Court would truly revolutionize the relationship between a State and its citizenry. If it is constitutionally permissible for a State

to distribute the fruits of economic development based upon length of citizenship, then the idea of equal citizenship has been lost. A State could as easily issue fishing licenses which entitle the bearer to take one fish for every year that he had lived in the State, ration the use of the public lands based on durational residency or reserve the finest schools for the children of long-term residents. Appellants submit that equality of citizenship is among the most fundamental of values and that an unlimited and perpetual durational residency requirement profoundly offends that right.

2. No State should be permitted to tilt the balance in the local economy in favor of long-term residents whether the assistance is called welfare, Permanent Fund dividends or gifts. The title really matters very little to the new resident who is disadvantaged by the unfair treatment.

The question of whether a State may impose an unlimited and perpetual durational residency requirement in conferring economic advantage is one which led the Alaska Supreme Court to confusing and contradictory results. In the first opinion issued in this case, which has become known as *Zobel I*, the Alaska Supreme Court declared unconstitutional a scheme to exempt persons who had filed three or more returns from the individual income tax. *Williams v. Zobel*, No. 2170 (Alas. Sept. 19, 1980). The plurality opinion concluded that this was the constitutional equivalent of exempting long-term residents from the income tax while still requiring new residents to pay it and struck the plan down.

In the case now before this Court, the Alaska Supreme Court concluded that it is constitutionally permissible to confer economic advantage on the basis

of duration of residency. This leads to the startling conclusion that it would be unconstitutional to exempt long-term residents from taxation but constitutional to preferentially give them the money to pay their taxes.

It is not easy to determine whether providing money to one person is providing an advantage to that person in the local market place or disadvantaging another person who does not receive any money. As an example, appellants would refer the Court to the Affidavit of Thomas Williams, Commissioner of Revenue, which was filed by the State of Alaska in support of their opposition to the Application for Stay. In that Affidavit, Mr. Williams states that it is his firm impression that many residents of Alaska are relying on these dividend distributions to defray a significant portion of their living expenses because of the high cost of living in Alaska. Assuming that is true, there is no reason why only long-term residents would need this sort of economic assistance or why the State should be permitted to provide it preferentially to them while simultaneously disadvantaging new residents in the local economy. To the extent that this statute preferentially provides economic assistance or advantage to long-term residents, the case is similar to *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

3. This program determines each resident's share in the State's oil, gas and mineral revenues, including Federal lease and bonus revenues, based upon the recipient's duration of residency viewed retrospectively to Statehood.

The State offered several reasons for this retrospective application below. First, the State argued that giving people money based on how long they have resided in the State tends to hold down population turnover. Even assuming that is true and that reducing turnover is a permissible State objective, there is no reasonable basis for the State to give someone who arrived in 1960 more money than someone who arrived in 1970 if the goal is to discourage both of them from severing their ties with Alaska.

The second reason which was advanced was that the retrospective distribution encourages conservation of resources and promotes public interest in the Fund. The State of Alaska has never shown any reason why one group of *bona fide* residents should be given an incentive to be more interested in the Fund than other residents. The Superior Court Judge who originally ruled the plan unconstitutional held that this reason was insufficient under any standard of review. The need or desire to engender political support for a State program will not justify an otherwise impermissible classification. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 391-92 n.24 (1978); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 266 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969). Nor will citing concern over the protection of the public fisc justify a durational residency requirement. *Memorial Hospital v. Maricopa County*, 415 U.S. at 263-65; *Rivera v. Dunn*, 329 F.Supp. 554 (D. Conn. 1971), *aff'd*, 404 U.S. 1054 (1972).

The final reason advanced for the retrospective application of this statute was that it rewards past intangible contributions of the citizenry. This is nothing

more than a notion that those who have been in Alaska the longest should get the most. The majority below accepted this rationale but the dissent correctly rejected it out of hand. Citing *Shapiro* and *Vlandis*, for the proposition that State services and benefits cannot be conferred on the basis of past tax contributions, the dissent reasoned that the result would not have been any different if the argument had been based on intangible contributions. No. 2201, Slip Op. at 64-68.

Nothing except what Judge Coffin termed "vague sentiment" favors allowing a State to pass statutes which distinguish between five, ten and twenty year residents based solely on duration of residency. *Cole v. Housing Authority of City of Newport*, 435 F.2d 807, 813 (1st Cir. 1970). Acceptance of such a rationale would lead to a "pervasive and profound inequality in nearly all phases of a states' relationship with its citizens." *Williams v. Zobel*, No. 2170, Slip Op. at 18 (Alas. Sept. 19, 1980) (plurality opinion).

4. In response to this challenge over the obvious inequalities in the distribution scheme, the State argued that today's new residents will receive a modest distribution and that they might somehow catch up as today's oldtimers die or move away. Thus, by forecasting a lifetime of potential effects which, if they actually occur, might tend to minimize present inequalities, the majority reasoned that "we cannot say that a new resident can be properly characterized as being consistently denied parity with long-term residents." No. 2201, Slip Op. at 21-22.

The dissent observed that the State's argument is no different than asserting that a new resident who is not eligible for welfare because of a one year durational

residency requirement is not treated differently from a one year resident who does receive welfare because the former may remain in the State longer, and thus collect more benefits, than the latter. No. 2201, Slip Op. at 55. (Dimond, J., dissenting).

Moreover, it is not obvious that a lifetime of effects can be projected for a program which, by its very nature, depends on the depletion of a finite non-renewable resource. A program, any program, should be judged on the basis of how it operates in the present, not how it might operate in the indefinite future.

5. In *Shapiro v. Thompson*, 394 U.S. at 632-633, this Court rejected an attempt to distinguish between old and new citizens on the basis of past tax contributions by stating that:

> Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police or fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

State citizenship is a constitutionally guaranteed right. The first sentence of the Fourteenth Amendment makes that clear. Governmental choices should be based on legitimate governmental objectives and not upon the status of any particular citizen in a State created caste system.

While durational residency classifications can be used to test the *bona fides* of a claim of State citizenship, they should be subjected to strict scrutiny where, instead of serving as a test, they serve only as a device

to perpetually deny equal status and equal citizenship to persons who are unquestionably State citizens.

6. Summary reversal of the Alaska Supreme Court in this case is justified. This case is novel only in the sense that no previous case of this Court has considered a durational residency requirement of such length or permanency. This fact does not make the unconstitutionality of the challenged statute any less certain. With this statute, Alaska has crossed a threshold that is unusual even in view of its long history of discrimination against non-residents and new residents.[3] Conditioning any State right upon an unlimited and perpetual durational residency requirement is clearly

---

[3]The following cases have considered other efforts of the State of Alaska to exclude non-residents and new residents from the fruits of Alaska's development. *Mullaney v. Anderson*, 342 U.S. 415 (1952) ($5.00 fee on resident commercial fisherman and $50.00 fee on non-resident commercial fisherman violates Privileges and Immunities of the United States Constitution); *Brown v. Anderson*, 202 F.Supp. 96 (D. Alas. 1962) (three-judge Court) (Act authorizing closing of commercial fishing areas to non-residents violates both the Privileges and Immunities Clause and the Commerce Clause); *State v. Wylie*, 516 P.2d 142 (Alas. 1973) (one year durational residency requirement for State employment preference violates equal protection); *Lynden Transport, Inc. v. State*, 532 P.2d 700 (Alas. 1975) (discrimination against non-resident motor carriers violates equal protection); *Hicklin v. Orbeck*, 565 P.2d 159 (Alas. 1977) (one year durational residency requirement for employment on Alaska Pipeline violates equal protection, residency requirement upheld) *rev'd* 437 U.S. 518 (1978) (residency requirement for employment on Alaska Pipeline violates privileges and immunities); *Thomas v. Bailey*, 595 P.2d 1 (Alas. 1979) (State land disposal based on durational residency up to ten years unconstitutional on other grounds); *Williams v. Zobel*, No. 2170 (Alas., Sept. 19, 1980) (taxing the income of only residents of three years duration or less violates equal protection).

beyond the commands of *Shapiro, Dunn, Memorial Hospital*, and *Sosna.*

CONCLUSION

This case presents serious constitutional questions regarding equal citizenship, federalism and the right to travel.

In reality, this program is founded on nothing other than the notion that persons who have lived in Alaska the longest are its most deserving citizens. This statute represents nothing less than a massive raid upon the treasury of one of the wealthiest States in the Union by long-term residents. It is an effort to insulate that group from sharing the benefits of the development of resources which belong to all of the citizens. If this Court does not reverse the Alaska Supreme Court, the distributions made under this program during the next ten years will be counted in billions of dollars.

Alaska is not the only State in the Union with resource wealth. If long-term residents may be allowed to insulate themselves from sharing the benefits which flow from the development of those resources with new citizens and to positively disadvantage new citizens in the local economy, then the twin ideals of equal citizenship and free movement across State borders will have suffered a serious blow.

Respectfully submitted,

MARK A. SANDBERG
CAMAROT, SANDBERG & HUNTER
310 "K" Street, Suite 408
Anchorage, Alaska 99501
Counsel for Appellants.

January, 1981

APPENDIX

APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 5400

OPINION

(No. 2201–October 24, 1980)

THOMAS WILLIAMS, Commissioner of Revenue, and STATE OF ALASKA,

Appellants,

v.

RONALD M. ZOBEL and PATRICIA L. ZOBEL, husband and wife,

Appellees.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Achorage, Ralph E. Moody, Judge.

Appearances: Susan Burke, Assistant Attorney General, Avrum M. Gross, Special Assistant Attorney General, Wilson L. Condon, Attorney General, Juneau, for Appellants. Mark Sandberg, Camarot, Sandberg & Hunter, Anchorage, for Appellees. Robert C. Erwin, Erwin & Smith, for Amicus Curiae Kenai Peninsula Borough.

Before: Rabinowtiz, Chief Justice, Connor, Burke and Matthews, Justices, and Dimond, Senior Justice. [Boochever, Justice, not participating.]

RABINOWITZ, Chief Justice.
BURKE, Justice, concurring.
DIMOND, Senior Justice, joined by Matthews, Justice, dissenting.

This is an appeal from the summary judgment of the superior court which invalidated, as a matter of equal protection and the right of interstate migration, the permanent fund income distribution statute, AS 43.23.010-.100,[1] passed in April, 1980, by the Alaska legislature.[2] We reverse the superior court's summary judgment as to the permanent fund distribution statute.

In so doing, we are re-affirming our modification of the equal protection test which had traditionally been applied in the right-to-migrate context by this court.[3] Before discussing the permanent fund income distribution statute itself (section II), we review our reasons for modifying the test (section I).

---

[1] Ch. 21, SLA 1980.

[2] The superior court also invalidated, on equal protection grounds, another statute establishing a system of tax exemptions based on prior filing of tax returns (ch. 22, §§1, 4-9, SLA 1980). In a separate set of opinions, we upheld that judgment. Williams v. Zobel, ____ P.2d ____, Op. No. 2170 (Alaska, September 19, 1980).

[3] *See* Hicklin v. Orbeck, 565 P.2d 159 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 57 L.Ed.2d 397 (1978); Gilbert v. State, 526 P.2d 1131 (Alaska 1974); State v. Adams, 522 P.2d 1125 (Alaska 1974); State v. Wylie, 516 P.2d 142 (Alaska 1973); State v. Van Dort, 502 P.2d 453 (Alaska 1972).

I. The Federal and State Equal Protection Tests as They Relate to the Right of Interstate Migration

Initially, our analysis of state equal protection law tracked that of federal law by the United States Supreme Court closely in all areas, including that of classifications penalizing the exercise of the right of interstate migration.[4] As we used the traditional "two-tier" analysis[5] under our equal protection clause, there was no need to differentiate between the federal and state modes of analysis.

Following some broad language in the United States Supreme Court case of *Dunn v. Blumstein*, 405 U.S. 330, 31 L.Ed.2d 274 (1972),[6] we interpreted this line of cases as holding that any durational residency

---

[4]The term "right to migrate" is used to emphasize that we are dealing with a possible limitation on the right to move into and settle in Alaska, not just the right to travel into the state.

> The phrase 'right to travel' is often used. But in cases challenging durational residence requirements, the right at stake is to travel into a different state and make one's home there, not merely to travel.

Hicklin v. Orbeck, 565 P.2d 159, 162-63 n.5 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 57 L.Ed.2d 397 (1978).

[5]*See* Note, *Durational Residency Requirements: The Alaskan Experience*, 6 U.C.L.A.–Alaska L. Rev. 50, 52-53 (1976).

[6]"In sum, durational residence laws must be measured by a strict equal protection test: They are unconstitutional unless the State can demonstrate that such laws are '*necessary* to promote a *compelling* governmental interest.' " Dunn v. Blumstein, 405 U.S. 330, 342, 31 L.Ed.2d 274, 294 (1972), *quoting* (in part) Shapiro v. Thompson, 394 U.S. 618, 634, 22 L.Ed.2d 600, 615 (1969) (emphasis in original).

requirement[7] imposed a penalty on the right of interstate migration, and thus automatically invoked the "strict scrutiny" analysis:[8]

> All durational residency requirements inherently infringe upon the fundamental constitutional right of interstate travel. Hence, all such requirements are prima facie invalid and will be countenanced only when they serve a compelling state interest.

State v. Adams, 522 P.2d 1125, 1131 (Alaska 1974) (footnotes omitted).

However, the United States Supreme Court made it clear that this interpretation was incorrect as a matter of federal equal protection law. In *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 39 L.Ed.2d 306 (1974), the Supreme Court, although invalidating that durational residency requirement, made it clear that some durational residency requirements would not

---

[7] A durational residency requirement, which draws a distinction between new and old residents based on the length of their residency, must be distinguished from a residency requirement, which draws a distinction between residents and nonresidents. Generally, a state has much more authority to draw distinctions between residents and nonresidents than between long- and short-term residents. *See* Vlandis v. Kline, 412 U.S. 441, 452-53, 37 L.Ed.2d 63, 72 (1973); Fisher v. Reiser, 610 F.2d 629, 635 (9th Cir. 1979). Distinctions based on residency requirements are generally analyzed under the privileges and immunities clause of the Federal Constitution, *see* Hicklin v. Orbeck, 437 U.S. 518, 57 L.Ed.2d 397 (1978), whereas durational residency requirements are traditionally analyzed under the equal protection or due process clauses, although this pattern does not always hold true. *See, e.g.*, Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371, 56 L.Ed.2d 354 (1978).

[8] We use "strict scrutiny" as a shorthand for the "necessary to promote a compelling state interest" test.

penalize the right of interstate migration, and thus would not invoke strict scrutiny.[9] This was made even clearer in the case of *Sosna v. Iowa*, 419 U.S. 393, 42 L.Ed.2d 532 (1975), which upheld a one-year durational residency requirement for filing a divorce petition. Thus, under federal law, a durational residency requirement does not automatically invoke strict scrutiny.

That our interpretation in this area was stricter than the federal interpretation is also shown by the rulings in our cases, which struck down durational residency

---

[9] Although any durational residence requirement impinges to some extent on the right to travel, the Court in *Shapiro* did not declare such a requirement to be per se unconstitutional. The Court's holding was conditioned by the caveat that some 'waiting period *or* residence requirements . . . may not be penalties upon the exercise of the constitutional right of interstate travel.' The amount of impact required to give rise to the compelling-state-interest test was not made clear.

. . . .

Although any durational residence requirement imposes a potential cost on migration, the Court, in *Shapiro*, cautioned that some 'waiting-period[s] . . . may not be penalties.' 394 U.S. at 638 n.21, 22 L.Ed.2d 600. [footnotes and citations omitted] [emphasis in original]

Memorial Hosp. v. Maricopa County, 415 U.S. 250, 256-59, 39 L.Ed.2d 306, 314-15 (1974).

Additionally, both *Maricopa County* and the case of Vlandis v. Kline, 412 U.S. 441, 37 L.Ed.2d 63 (1973), indicated that the Supreme Court continued to approve of its summary affirmance of Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), *aff'd without opinion*, 401 U.S. 985, 28 L.Ed.2d 527 (1971), which upheld a one-year durational residency requirement for reduced tuition purposes. *Vlandis*, 412 U.S. at 452 n.9, 37 L.Ed.2d at 72 n.9; *Maricopa County*, 415 U.S. at 259 & n.12, 39 L.Ed.2d at 315 & n.12.

requirements which the United States Supreme Court probably would have upheld. For example, in *State v. Adams*, 522 P.2d 1125 (Alaska 1974), we struck down a one-year durational residency requirement for eligibility to file for a divorce, very similar to the one upheld by the United States Supreme Court in *Sosna v. Iowa*, 419 U.S. 393, 42 L.Ed.2d 532 (1975).[10]

Our cases, still functioning under the two-tier approach, continued to regard durational residency requirements as automatically triggering strict scrutiny, and rejected the distinctions by which federal equal protection cases in this area separated strict scrutiny cases from rational basis cases.[11] Implicitly, our course was based on a recognition that removing these cases from the strict scrutiny approach would require that they be judged by a rational basis standard, which would give insufficient weight to the important right involved.[12] But the need for an "intermediate ap-

---

[10]Also, *compare* State v. Van Dort, 502 P.2d 453, 455 (Alaska 1972) (interpreting Dunn v. Blumstein, 405 U.S. 330, 31 L.Ed.2d 274 (1972) as setting 30 days as the maximum permissible durational residency period for voter eligibility), *with* Marston v. Lewis, 410 U.S. 679, 35 L.Ed.2d 627 (1973) (upholding Arizona's 50-day durational residency requirement for voter eligibility).

[11]*See* Hicklin v. Orbeck, 565 P.2d 159, 163 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 57 L.Ed.2d 397 (1978): "We have never used this 'basic necessities' reasoning." The "basic necessities" rationale is one basis upon which the United States Supreme Court has distinguished strict scrutiny cases from rational basis cases in this area. *See* note 22 and accompanying text, *infra*.

[12]Even after the court decided Isakson v. Rickey, 550 P.2d 359 (Alaska 1976), which replaced the old "rational basis" test

[footnote continued]

proach" between these two extremes[13] was apparent in an increased willingness to find a "compelling state interest," a very difficult standard to fulfill under federal law.[14]

In *State v. Erickson*, 574 P.2d 1 (Alaska 1978), we adopted a new equal protection analysis, using one uniform balancing approach rather than the two-tier approach which had been increasingly subjected to criticism on several grounds.[15]

---

with a more intensified means-to-end inquiry—the "fair and substantial relationship" test—the right of interstate migration would have been unduly denigrated by assignment to the lower tier. The test announced in *Isakson* was not intended to take into account the infringement which a classification might have on constitutionally protected interests.

[13]To some extent, the Supreme Court's decision in Sosna v. Iowa, 419 U.S. 393, 42 L.Ed.2d 532 (1975), can be seen as reflecting this same need. The Court, although refusing to apply the strict scrutiny test, also refrained from explicitly assigning the case to the rational basis tier. This was one basis for the dissent's criticism of the holding—that the opinion articulated no standard and instead used an "ad hoc balancing test." *Sosna*, 419 U.S. at 419, 42 L.Ed.2d at 552 (Marshall, J., dissenting).

[14]*See* Dunn v. Blumstein, 405 U.S. 330, 363-64, 31 L.Ed.2d 274, 296 (1972) (Burger, C. J., dissenting):

> Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.

Compare Hicklin v. Orbeck, 565 P.2d 159, 163 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 57 L.Ed.2d 397 (1978): "We have never used the 'basic necessities' reasoning. . . . On the other hand, our use of strict scrutiny has not always resulted in holding challenged laws unconstitutional."

[15]The new balancing test has advantages over both tiers of the old test. At the lower end, the test replaces "virtual abdication"

[footnote continued]

Since *Erickson*, and prior to our decision in *Zobel I*, we had decided two cases which involved the right of interstate migration, and in both the question of *Erickson's* application to this area was postponed. *See Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979); *Castner v. City of Homer*, 598 P.2d 953 (Alaska 1979).

In *Zobel I*, we announced our decision to apply *Erickson* to the right-to-migrate context.[16]

In our view the uniform balancing approach adopted in *Erickson* is much more appropriate in this context than the two-tier analysis used in our prior cases. Further, we will no longer regard all durational residency requirements as automatically triggering strict scrutiny and requiring a showing that such a classification is absolutely necessary to promote a compelling state interest. Instead, we will balance the nature and extent of the infringement on this right caused by the classification against the state's purpose in enacting the statute and the fairness and substantiality of the relationahip between that purpose and the classification.[17]

---

with "genuine judicial inquiry." Isakson v. Rickey, 550 P.2d 359, 363 (Alaska 1976). Where infringement of various rights is alleged, the test results in a "more flexible, less result-oriented analysis." State v. Erickson, 574 P.2d 1, 12 (Alaska 1978).

[16]*See* Williams v. Zobel, ____ P.2d ____, ____, Op. No. 2170 at 13 (Alaska, September 19, 1980) (plurality opinion); *Id.* at ____ n.1, Op. No. 2170 at 25 n.1 (Rabinowitz, C. J., concurring); *Id.* at ____, Op. No. 2170 at 48-49 (Connor, J., dissenting).

[17]*See* State v. Erickson, 574 P.2d 1, 12 (Alaska 1978). We do not, by this holding, mean to indicate that we are retreating from the strict scrutiny test, or its equivalent under *Erickson*, where rights other than the right of interstate migration are involved—*e.g.*, rights to freedom of speech, privacy, etc.

In those situations in which federal law would apply strict scrutiny, this court must also. This divergence of the two sets of analyses will necessitate separate consideration of the permanent fund earnings distribution statute under federal and state equal protection law.

II. The Permanent Fund Earnings Distribution System

The recent tremendous wealth bestowed upon Alaska by the development of oil and mineral resources has created governmental problems unique to this state. Both the original establishment of the permanent fund and the later statute establishing a system for distributing the earnings from the fund represent novel mechanisms to deal with this wealth.

The creation of the fund was a response to two specific concerns. First, the people of the state recognized that Alaska's oil and mineral wealth is based on nonrenewable resources which will become depleted at some point in the future, potentially leaving Alaska with the choice of either terminating certain governmental programs or continuing them through increases in taxation. The permanent fund channels some of the current wave of moneys into just what its name implies—a permanent fund, the earnings from which will help defray the costs of government at that future time when the nonrenewable resources run out.

The second concern was the temptation to use the current flood of funds for costly, wasteful, and unnecessary government projects. Typically, some limit is placed on this tendency by the fact that funding for such programs must come from the taxpayers. With this

damper removed, the people of Alaska recognized the need to substitute some other form of restraint. Thus, the constitutional provision establishing the fund places the principal of the fund beyond the legislature's appropriation power, which can be exercised only over earnings derived from the fund.

The legislature's subsequent decision to use its appropriation power over the earnings to distribute some of the earnings directly to Alaska residents was also unique. Undoubtedly, the legislature was aware that such action would be popular with its constituency. However, there is merit in the state's contention that there was an additional motive for choosing to distribute some of the earnings. The earnings alone have been substantial enough to engender concern over the unwarranted and "painless" growth of government. By distributing some of the fund's income directly to residents, the state could insure that future legislatures will face a spending limit. To exceed this limit, the legislature would have to "take back" some of the fund's income distributed to Alaskans. This would, in effect, simulate a legislative choice to enact a tax.

The mechanism established to effect this distribution of earnings is as follows: one-half of the fund's earnings are to be distributed in dividends of at least fifty dollars.[18] To be eligible, a person must be eighteen

---

[18]Under the statute, the amount of each dividend is calculated by dividing the income to be distributed (one-half of the annual interest income of the fund) by the total number of dividends to be distributed that year. AS 43.23.030. If the income is insufficient to provide at least $50 per dividend, the legislature may appropriate money from the general fund as a loan to the dividend fund. AS 43.23.050.

years of age and a resident of Alaska. AS 43.23.010(b). There is no "durational residency" requirement; a bona fide resident of Alaska is immediately eligible for a pro rata portion of his or her first dividend. AS 43.23.010(f). However, the number of dividends received by an eligible person is determined by length of residency, with one dividend allowed for each full year of residency since statehood (1959). AS 43.23.010(a). It is this connection between length of residency and the number of dividends received which is at issue here.[19]

---

[19]We do not disagree with the dissent's characterization of the statute as a "durational residency requirement." To the extent that this term could be interpreted to mean that a period of residency is required for eligibility for participation in the program, as was the case in *Shapiro*, *Dunn*, and *Maricopa County*, the term would be a mischaracterization. However, the dissent makes it clear that this is not the case; rather, the statute gears the amount of benefits to length of residency. We think the term "durational residency link" more accurately characterizes this relationship, but as there is no dispute over the statute's operation, the matter is only one of semantics, the resolution of which would not further analysis.

The relevant United States Supreme Court case law relied upon by the dissent on this point has dealt entirely with two-stage durational residency provisions—*i.e.*, those creating two classes, one eligible, one ineligible. We agree with the dissent that such periods cannot be unreasonably long. We deal here with a multi-stage durational residency provision. The dissent, drawing from the rulings that two-stage durational residency provisions must be reasonable, concludes that any multi-stage durational residency provision is impermissible. We think the more likely conclusion is that multi-stage durational residency provisions are to be assessed by the same principles and criteria as two-stage durational residency provisions, and as such they are not automatically impermissible.

On April 28, 1980, Ronald and Patricia Zobel, residents of Alaska since 1978, filed suit challenging this statute on the ground that it violates the equal protection clauses of both the United States and Alaska Constitutions. On June 27, 1980, the superior court issued its decision declaring the statute invalid under the equal protection clause of the Alaska Constitution. The State has appealed that decision to this court. Application of the *Erickson* test leads us to conclude that the statute is constitutional.

A. Federal Equal Protection Claim

As federal equal protection law still uses the two-tier analysis, the initial inquiry must be to determine which of the two standards is to be applied. Although the question is not a clear one, we conclude that the rational basis standard is applicable.[20]

We recognize that the United States Supreme Court applied a strict scrutiny analysis in the cases of *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600 (1969), *Dunn v. Blumstein*, 405 U.S. 330, 31 L.Ed.2d 274 (1972), and *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 39 L.Ed.2d 306 (1974), and that there is language, particularly in *Dunn*, which indicates that any durational residency requirement automatically triggers the strict scrutiny analysis. But *Shapiro* and *Maricopa County* explicitly left open the possibility that there might be durational residency requirements which do not trigger strict scrutiny because they would not "penalize" the exercise of the right of interstate

[20] *See* section I *supra*.

migration; and the strict scrutiny analysis was not applied in the most recent United States Supreme Court pronouncement on the subject, *Sosna v. Iowa,* 419 U.S. 393, 42 L.Ed.2d 532 (1975).

We think that language in *Shapiro* and *Maricopa County* and the ruling in *Sosna* indicate that a durational residency requirement does not automatically trigger strict scrutiny. To determine whether or not the stricter test is applicable, we must look at the factors which have been advanced in the Supreme Court cases as explaining the different results. Our analysis of the cases reveals four possible "distinguishing factors," any one of which may invoke the strict scrutiny test.

First, *Sosna* distinguished the earlier cases on the basis that they had involved state justifications based only on administrative, budgetary, or recordkeeping needs.[21] To the extent that this distinction does apply here, the justifications put forward by the state go beyond budgetary, recordkeeping, and administrative concerns, and thus, under this distinction, the case at bar falls into the *Sosna* non-strict scrutiny camp.

---

[21]What those cases [*Shapiro, Dunn,* and *Maricopa County*] had in common was that the durational residency requirements they struck down were justified on the basis of budgetary or recordkeeping considerations which were held insufficient to outweigh the constitutional claims of the individuals.

. . . .

Iowa's residency requirement may reasonably be justified on grounds other than purely budgetary considerations or administrative convenience.

Sosna v. Iowa, 419 U.S. at 406, 42 L.Ed.2d at 544-45.

The second distinction is the one suggested in *Maricopa County*—the "basic necessities" distinction. If the benefit of which new residents are deprived by the state is a "basic necessity" of life—*e.g.*, the welfare payments in *Shapiro*, or the medical care in *Maricopa County*— then the strict scrutiny test is appropriate; otherwise, it is not.[22] Under this distinction, this case clearly falls into the non-strict scrutiny category, as a permanent fund earnings dividend is not a "basic necessity."

The third distinction is suggested by two passages in *Sosna* and by some language in *Vlandis v. Kline*, 412 U.S. 441, 37 L.Ed.2d 63 (1973).[23] This distinction

---

[22]Although any durational residence requirement imposed a potential cost on migration, the Court, in *Shapiro*, cautioned that some 'waiting-period[s] . . . may not be penalties.' . . . In *Shapiro*, the Court found denial of the basic 'necessities of life' to be a penalty.

. . . .

Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance.

Memorial Hosp. v. Maricopa County, 415 U.S. at 258-59, 39 L.Ed.2d at 315 (citations and footnotes omitted).

[23]*Sosna* distinguished *Shapiro*, *Dunn*, and *Maricopa County* partially on the ground that:

Iowa's divorce residency requirement is of a different stripe. Appellant was not irretrievably foreclosed from obtaining some part of what she sought, as was the case with the welfare recipients in *Shapiro*, the voters in *Dunn*, or the indigent patient in *Maricopa County*. She would eventually qualify for the same sort of adjudication which she demanded virtually upon her arrival in the State. Iowa's requirement delayed her access to the courts but, by fulfilling it, a petitioner could ultimately obtain the same

[footnote continued]

indicates that there is a dispositive difference between a state absolutely denying a benefit and a state merely delaying provision of the benefit. Thus, a durational residency requirement of one year prior to eligibility to file a divorce action is permissible, since the right to file is merely delayed, not denied. This is a difficult distinction to apply in most cases, as any durational residency requirement can, it seems to us, be equally well characterized as either a "delay" or a "denial." The distinction becomes especially difficult when "denial" is interpreted to require that a party be "irretrievably foreclosed from obtaining *some part* of what the [the injured party seeks]," *Sosna*, 419 U.S. at 406, 42 L.Ed.2d at 544 (emphasis added). Additionally,

---

opportunity for adjudication which she asserts ought to be hers at an earlier point in time.

419 U.S. at 406, 42 L.Ed.2d at 544. Similarly, the Court distinguished another due process case:

> In Boddie v. Connecticut, [401 U.S. 371, 28 L.Ed.2d 113 (1971)] this Court held that Connecticut might not deny access to divorce courts to those persons who could not afford to pay the required fee. Because of the exclusive role played by the State in the termination of marriages, it was held that indigents could not be denied an opportunity to be heard 'absent a countervailing state interest of overriding significance.' 401 U.S. at 377, 28 L.Ed.2d at 113. But the gravamen of appellant Sosna's claim is not total deprivation, as in *Boddie*, but only delay. The operation of the filing fee in *Boddie* served to exclude forever a certain segment of the population from obtaining a divorce in the courts of Connecticut. No similar total deprivation is present in appellant's case, and the delay which attends the enforcement of the one-year durational residency requirement is, for the reasons previously stated, consistent with the provisions of the United States Constitution.

419 U.S. at 410, 42 L.Ed.2d at 547.

the fact that substantial hardship may be worked by the delay, a point raised by the dissent in *Sosna*, was apparently not regarded as significant by the majority.[24]

A close question is presented by the "delay" versus "denial" distinction, partly due to its inherent difficulty in application, and partly due to the nature of the program under scrutiny.[25] Although the result is not as clear as under the other two distinctions already considered, we still conclude that this case falls in the non-strict scrutiny camp.

Under the terms of the program, it is clear that there is no absolute denial. A new resident is immediately eligible for some portion of a dividend; and this new resident's achievement of the level of dividends currently held by a long-term resident who has been here since 1959 (twenty-one dividends, or a minimum of $1050) is only a matter of delay—*i.e.*, the new resident would have to remain a resident for twenty-one years. On the other hand, it could be said that the new resident will never achieve parity with the current long-term resident, as the latter will always be twenty-one dividends ahead of the former if both remain in the state. Under this view, the new resident is consistently "denied" that twenty-one-dividend differential. Both characterizations of the program are accurate, and one could label the situation either a delay or a denial.

---

[24]*Sosna*, 419 U.S. at 421, 42 L.Ed.2 at 554 (Marshall, J., dissenting): "[The majority's] analysis, however, ignores the severity of the deprivation suffered by the divorce petitioner who is forced to wait a year for relief."

[25]As a matter of construction of Alaska's equal protection clause, the distinction between delay and denial has no application.

However, the significance of the latter characterization is considerably diluted by several factors. First, as the state points out, it is entirely possible that the new resident will "catch up" and even surpass the number of dividends granted to the long-term resident, depending on the longevity of each. Additionally, the size of each dividend will vary from year to year, and is expected to increase during the foreseeable future so that the attainment of twenty-one dividends in the year 2001 is likely to be worth much more than the attainment of twenty-one dividends in 1980. Last, the new resident who arrives in 1980 and stays twenty-one years will not only get twenty-one dividends in 2001, but will have received a total of 210 dividends during the intervening years. In that respect also, the new resident may be better off, in that the twenty-one-year resident of 1980 receives twenty-one dividends in 1980, but no "back payments" for the 210 dividends he or she would have received had the program been established in 1959.

Taking these factors into account, we cannot say that a new resident can be properly characterized as being consistently denied parity with long-term residents. Although the delay/denial distinction is analytically difficult to apply in this context (indeed, one may question whether it has any applicability at all here), we are sufficiently satisfied that this is more properly classified as a delay than as a denial, and thus strict scrutiny analysis is not triggered here.[26]

---

[26]We think it inappropriate to base resolution of this appeal on predictions of the state's oil and gas reserves. The statute by its terms is of indefinite duration. Our ability to assess the extent of the state's oil and gas reserves, and its other mineral reserves,

[footnote continued]

The last possible distinction is suggested by the characterization of *Dunn* found in *Maricopa County* indicating that a state's denial of "fundamental rights"—*e.g.*, voting rights—to new residents but not to old will invoke strict scrutiny.[27] This distinction perhaps renders the right-to-migrate aspect of the case unnecessary, as it would seem that the denial of the additional "fundamental right" would in and of itself be enough to trigger strict scrutiny, with or without the presence of the right to migrate.[28] But assuming,

---

is too limited, compared to that of the legislature which examined this situation in enacting the statute, to justify any other approach. The relationship between this mineral reserve factor and the longevity of the earnings distribution program is further attenuated by two factors: first, the cessation of mineral income flowing into the fund will affect only its growth, not its income-generating capacity; and second, any cessation of the distribution program itself would be a difficult political decision—*i.e.*, the tradeoff between the program and other governmental services will have to be assessed, which is the primary reason for the earnings distribution system's original enactment.

[27]"In Dunn v. Blumstein, the Court found that the denial of the franchise, 'a fundamental political right,' was a penalty requiring application of the compelling-state-interest test." *Maricopa County*, 415 U.S. at 259, 39 L.Ed.2d at 315 (citations omitted).

[28]*Dunn* itself ruled that strict scrutiny was triggered by either the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel). 405 U.S. at 335, 31 L.Ed.2d at 280. *See also* Note, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A. L.Rev. 1129, 1153 (1975), which stated:

> In examining 'fundamental right' penalty analysis, one is struck by its redundancy. If only the denial of a separate, fundamental right constitutes a penalty on the right to travel, one wonders why denial of that separate right is not in itself enough to trigger strict scrutiny.

arguendo, the validity of the distinction, it seems clear that this case again falls into the *Sosna* nonstrict scrutiny category. If the right involved in *Sosna*—that of filing a lawsuit for divorce—does not trigger strict scrutiny, then the denial of initial equality in the distribution of permanent fund earnings, at stake here, also fails to do so under this distinction.

Thus, whatever distinction is applied, this case falls outside the strict scrutiny standard. Under traditional federal equal protection analysis, this means that the case comes within the lower tier, to be assessed under the rational basis standard.[29] As such, we think it is clear that this statute withstands constitutional scrutiny. However, we postpone discussion of the state's purposes until our analysis under the *Erickson* test. It is not necessary for us to assess the state's purposes under the rational basis standard here. If the purposes and the relationship between means and ends satisfy the stricter *Erickson* test, then they *a fortiori* meet the requirements of the less strict rational basis test; and if the statute fails to pass muster under the state test, then it is invalid regardless of whether it passes federal constitutional muster.

---

[29]There is a possibility that *Sosna* may have established an intermediate third tier involving some sort of balancing test. *See Sosna*, 419 U.S. at 419, 42 L.Ed.2d at 552 (Marshall, J., dissenting). If this is the case, this third tier is substantially undefined at this point. We believe we are justified in treating this possibility as the equivalent of our own *Erickson* test, and thus there is no need to assess the "third tier" independently.

B. State Equal Protection Analysis under *Erickson*[30]

Examination of the nature and extent of the infringement of the constitutional right involved has led us to conclude that this legislative scheme cannot be said to "penalize" the right of interstate migration. In commonsense terms, it is easy to see that the imposition of a tax primarily on new residents, with older residents exempt, can be perceived as a penalty imposed on a person who chooses to exercise his or her right to move into Alaska.[31] It is much more difficult to perceive such a "penalty" here. The new resident does, in fact, receive financial gain for exercising his or her right to move into Alaska; and whatever "penalty" may accrue from the fact that this gain is not as large as that realized by a long-term resident we regard as *de minimis*.

In making this judgment, we are aware of the statements by the United States Supreme Court that a showing of "deterrence" is not necessary to a finding of an infringement upon the right to migrate; but it is also true that the Court has consistently relied upon the

---

[30]The *Erickson* approach is essentially one of balancing. On the one hand, the court must assess (1) the legitimacy of the state purpose purportedly furthered by the provision, and (2) the extent to which the relationship between the end (the asserted purpose) and the means (the classification chosen) is fair and substantial. On the other hand, the court is to determine the nature and the extent of the infringement of individual rights allegedly caused by the classification. Then the balance is struck.

[31]*See* Williams v. Zobel, ____ P.2d ____, Op. No. 2170 at 26-27 (Alaska, September 19, 1980) (Rabinowitz, C. J., concurring).

severity of the penalty inflicted upon the individual for exercising the right of interstate migration in reaching its results in various cases.[32] In our view the permanent fund earnings distribution statute can only be characterized as a penalty with great awkwardness. We are therefore convinced that the exercise of the right of interstate migration is not penalized by the statute in question.

Turning to the state's purported interests in establishing the system and the fairness and substantiality of the relationship between the ends (*i.e.*, the "purpose" or state interest) and the means (*i.e.*, the classification), we find three purposes listed in the statute itself:

> (1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;
>
> (2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and
>
> (3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska

---

[32] L. Tribe, American Constitutional Law §16-8 at 1004 (1978), states:

> Yet although the Court [in Memorial Hospital v. Maricopa County, 415 U.S. 250, 39 L.Ed.2d 306 (1974)] acknowledged that a showing of *deterrence* from travelling by the challenged restriction was not only lacking but also unnecessary, the Court relied heavily on its conclusion that the *penalty* inflicted was very severe. ... [footnotes omitted] [emphasis in original]

permanent fund (art. IX, sec. 15, state constitution).

The state argues that the link between residency and number of dividends bears a fair and substantial relationship to the legitimate purpose of making an "equitable distribution," the first listed purpose. In so arguing, the state urges the court to recognize the "contributions of various kinds, both tangible and intangible," which residents have made during their years of state residency:

> Many have paid taxes; many have contributed to the cultural life of the state and have fostered the cultural diversity that makes Alaska so unique; many have contributed their ideas and have participated in the political life of the state; all have endured the rigors of a harsh climate; and all have borne the impact of a high cost of living. It is perfectly reasonable for the legislature to have concluded that it would be unfair in distributing permanent fund income to fail to recognize those years of residence during which people have had and will have a share in the mineral resources—years during which residents have made and will make contributions to the state.

In response, the Zobels cite us to *Cole v. Housing Authority of the City of Newport*, 435 F.2d 807, 813 (1st Cir. 1970), in which Judge Coffin, although granting that giving a preference to older residents may have a certain facial appeal, held that "such a vague sentiment, even if permissible, does not rise to the level of compelling state interest."

Although the question is a close one, we must hold that the purposes underlying this statute are legitimate under state law, and also that a fair and substantial

relationship exists between those purposes and the classification made under the distribution scheme. Throughout its history, from the days of the Gold Rush to the recent oil pipeline period, Alaska has been prone to the phenomenon that large numbers of people from without the state move in, derive great financial and other benefits from the state's resources and opportunities, and then move out to enjoy the fruits of their labors elsewhere. This obviously results in a great drain of financial and other resources from the state.[33] Of

---

[33] D. Kresge, T. Morehouse and G. Rogers, Issues in Alaska Development 32-33 (1977) (footnotes omitted), state:

> The nonresident nature of Alaska's economic activities was not limited to ownership and control of the means of production, but also included the labor force. Alaska's extreme seasonality (due to northern location, climatic conditions, fisheries, etc.), remoteness, lack of urban amenities, and high cost of living all favored the use of seasonally imported labor for much of the basic economic activities. Monthly data on employment covered by the Alaska unemployment compensation program for the period 1940-42 (the earliest of such data available) indicates that for all covered industries the low month of January was 59 percent of the annual average monthly employment and the high month of July, 148 percent (salmon canning ranged from a low of 16 percent of the annual monthly average to a high of 279 percent). Studies of labor in the Alaska canned salmon industry in 1939 and 1940 indicated that of all persons engaged in fishing, transporting, and processing within Alaska, 46 percent were resident Alaskans, 48 percent nonresidents and 6 percent were unallocated. Of the fish caught for the canneries, 43.6 percent were caught by residents and 56.4 percent by nonresidents (for the Western region—Alaska Peninsula and Bristol Bay—the fish catch was 34.6 percent by residents and 65.4 percent by nonresidents).

[footnote continued]

course, every state is equally subject to this phenomenon as a necessary by-product of the right of interstate migration; but Alaska is especially affected by

---

Because of this nonresident seasonal workforce, the balance of trade statistics for 1931-40 give only a partial view of the extent to which value of products from colonial Alaska escaped the local economies. The first attempts to calculate personal income received by residents of Alaska was made in the mid-1950's when much of the pre-World War II economy had disappeared, but the investigations of income generated by fishing and fish processing in 1954 give an indication. Of the total $78 million wholesale value of fisheries products, only $15 million or 19.2 percent represented earnings by residents.

Economics and labor requirements in turn determined colonial Alaska's social conditions. A 1937 look at Alaska generalized that 'the labor situation in the Territory is influenced by the fact that the population consists almost entirely of adult males, engaged for the most part in occupations requiring considerable physical activity and mobility, and living, to a very considerable extent, in rather scattered and often more or less temporary communities. This type of employment tends to discourage the building of normal family and communal life.' Census data document the male dominance (nine males to one female in 1900, five to one in 1909, three to one in 1920, and two to one in 1929 and 1939), that non-Natives overwhelmingly left Alaska before sixty-five years of age, and that the proportion of minors was abnormally low. To again quote the 1937 report, 'These circumstances again militate against the establishment of permanent communities with well-developed social activities.'

The problems noted in the 1937 report did not diminish with time:

Actually, throughout the years of the Second World War, the "cold war," and the Korean Conflict, Alaska had received people from all parts of the United States and elsewhere. Many of these new Alaskans were intent upon

[footnote continued]

this, due to its harsh climate, its high cost of living, and its geographical isolation from the other states. Although the problem is not unique to Alaska, the extent to which this problem affects the state is probably unparalleled.[34]

---

getting what they could from federal defense spending, saving as much as they were able with the hope of leaving the Territory and investing or spending their hard-earned Alaskan savings in some part of the continental United States where one could obtain much more for the dollar than in the Northland.

C. Hully, Alaska Past and Present 372 (3d ed. 1970). These problems have continued to plague Alaska:

> Responses from the 1970 census question, 'Where was this person five years ago?' reveal the significance of migration in Alaska. *Net* migration (persons entering minus persons leaving) comprised nearly one half of the population growth occurring between 1965 and 1970. However, that is only the tip of the iceberg. Approximately 120,000 individuals moved to Alaska between the years 1965 and 1970; yet, almost 100,000 Alaskans left the state over that same period. Thus for every six individuals who moved to Alaska, five individuals left the state.
>
> . . . .
>
> Alaska population growth throughout the 1960's was moderate when compared to the oil spurred growth of the 1970's. It is likely that in-, out-, and net-migration rates from the 1970 census will pale by comparison with the results of the upcoming 1980 census.

Alaska Dept. of Labor, Alaska Population Overview 30-31 (1979) (footnotes omitted).

[34]In making this analysis, we do not mean to indicate that Alaska is to be allowed greater leeway in this area than other states. We think any state could validly pursue similar techniques to reward long-term residents. The point is that most other states have much less need to do so than Alaska, since the problem is much less acute.

Since this problem is a necessary by-product of the free exercise of the right of interstate migration, neither Alaska nor any other state may attempt to ameliorate it by penalizing an individual for choosing to exercise the right to migrate. However, this does not preclude an attempt to reward those Alaskan residents who have chosen to stay, to enjoy the fruits of their labor here, and to make a lasting contribution, tangible or intangible, to the state's culture and commonwealth. Such an attempt does not penalize those who choose to leave any more than a firm's awarding of a gold watch to a fifty-year employee penalizes employees who leave before working for fifty years.

Thus, we find this purpose permissible. We need not take issue with Judge Coffin's statement in *Cole* that it does not rise to the level of a "compelling state interest," inasmuch as we have ruled that durational residency requirements do not, under *Erickson's* approach, automatically trigger strict scrutiny.[35]

In finding that the state may reward long-term residents for their past intangible contributions, we are guided by the analysis set forth in our opinions in the other half of this case, concerning former AS 43.20.017 (ch. 22, SLA 1980), the tax exemption statute. In that context, the parties argued over the legitimacy of the state recognizing past tax contributions in granting tax relief. The plurality opinion found this purpose absolutely impermissible, under *Shapiro v. Thompson*,

---

[35]This does not necessarily mean that all classifications based on this purpose will be upheld; a classification may very well be inappropriate if it results in a penalty being placed on the exercise of the right of interstate migration.

394 U.S. 618, 632-33, 22 L.Ed.2d 600, 614 (1969). *See Williams v. Zobel*, ____ P.2d ____, ____, Op. No. 2170 at 17-18 (Alaska, September 19, 1980). The concurrence rejected this absolutist postion, *id.* at ____, Op. No. 2170 at 34-35 (Rabinowitz, C. J., concurring), noting that it would be inconsistent with the Supreme Court's affirmance in *Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn. 1970), *aff'd without opinion*, 401 U.S. 985, 28 L.Ed.2d 527 (1971), *cited with approval, Vlandis v. Kline*, 412 U.S. 441, 452 n.9, 37 L.Ed.2d 63, 72 n.9 (1973), in which the district court specifically relied upon a past tax contributions rationale. We also note that the absolutist position is undercut by the Supreme Court's opinion in *Reeves, Inc. v. Stake*, ____ U.S. ____, 65 L.Ed.2d 244 (1980), which upheld South Dakota's policy of selling cement from its state-owned plant only to state residents, against a commerce clause attack. The Supreme Court stated, "The State's refusal to sell to buyers other than South Dakotans is 'protectionist' only in the sense that it limits benefits generated by a state program to *those who fund the state treasury* and whom the State was created to serve." ____ U.S. at ____, 65 L.Ed.2d at 254 (emphasis added). We think that this analysis is persuasive in concluding that rewarding past intangible contributions is also a permissible purpose, albeit not a particularly compelling one.

The Zobels argue, and the superior court found, that even if the purpose is permissible, there is no fair and substantial relationship between recognizing past contributions and the classification based on length of residency:

> [T]he state admits that, in order to qualify for a share in the resources trust, it is not even necessary that a person have made any contribution to the state at all. All that is required is that a person be a resident.

Although we recognize that length of residency may be an imperfect measure of past contributions, we have concluded that the state may recognize these contributions. The fit between means and ends need not be perfect. We think the relationship is fair and substantial. There clearly is a correlation between one's length of residency and the extent to which that individual has been able to make contributions to the community. We are not convinced that any workable alternative method of measuring past contributions is clearly preferable. Although the existence of a preferable alternative would not automatically render the relationship unfair or insubstantial, the absence of any preferable workable alternative is a strong indication that the classification chosen by the legislature is acceptable. We think that the relationship is as fair and substantial as the Alaska Constitution requires in this context.

The second of the listed purposes is clearly related to the classification system. A significant financial incentive is created to encourage persons to establish and maintain residency in Alaska; and the stabilization of long-term residents clearly reduces population turnover. The Zobels do not argue that this is an impermissible purpose,[36] but rather that it does not rise to the level of "compelling." They argue that the state enjoys wide

---

[36]It could be argued that the financial incentive to remain is an attempt to discourage long-term residents from exercising

[footnote continued]

latitude in possible approaches to the population turnover problem, but that penalizing new residents for having recently exercised the fundamental right to migrate is not among them. As above, we do not regard this system as imposing a "penalty" on new residents. Thus, we hold this purpose to be permissible and the relationship clear, as these points seem uncontested.[37]

---

their right of interstate migration, and that, if all the states were to enact such a program this effect would be significant. We do not regard this argument as relevant here, for several reasons. First, the Zobels do not argue that this factor is pertinent to their own decision as to whether or not to exercise their right of interstate migration. Second, even if they did so, there would be a serious standing problem, as they are not in the position of a long-term Alaska resident facing a loss of permanent fund benefits by leaving the state. Third, the loss in such a situation would stem from the statute's simple residency requirement, AS 43.23.010(b)(2), not its durational residency link, and thus would be subject to a different mode of analysis.

Even assuming that we ignored all previous objections, there is authority to reject the argument on its merits. In Fisher v. Reiser, 610 F.2d 629 (9th Cir. 1979), the court upheld a Nevada law which, although paying workers' compensation benefits to eligible beneficiaries whether they lived inside or outside the state, included a cost-of-living increase limited to those recipients living in the state. The Ninth Circuit held that the decrease in benefits visited upon a recipient migrating out of the state did not burden the right to travel in a manner requiring strict scrutiny:

> For some kinds of monetary benefit programs for which a residency requirement would be constitutional, a state is not required to, and may not in fact, provide any program at all. Losing such benefits upon migration from a state which does provide them does not thereby mean the right to travel has been infringed.

Id. at 635. *See also* Califano v. Torres, 435 U.S. 1, 55 L.Ed.2d 65 (1978).

[37]We note that the relationship between the classification and purposes (2) and (3)—to encourage long-term residency and

[footnote continued]

The third justification proffered is, perhaps, the most interesting: that the distribution scheme "encourages increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund."

---

increased awareness of the management of the fund—is somewhat diluted by the fact that the term of residency is counted, not from 1980, but from 1959. However, we do not find that this changes the outcome of the balance, for several reasons.

First, the selection of the year from which residency will be counted is not a significant aspect of the statute. The state points out that, were residency counted from 1980, a new resident migrating to the state in 2001 would be in the same situation as appellees are now; if the statute would be constitutional with residency counted from 1980 as to residents migrating into Alaska in 2001, it is constitutional as to the Zobels here with residency counted from 1959.

Second, we think that purpose (1)—expressing the state's appreciation for the tangible and intangible contributions of its long-term residents—does justify the selection of the 1959 date. Statehood was the point at which this state first became entitled to the resources which have yielded the income currently being distributed. Also, the state's low population and sudden assumption of statehood responsibilities in 1959 made the next few years difficult for the state and its residents:

> A government such as the one embodied in the Alaska constitution, however, with its complete range of governmental services, was expensive for a State with limited sources of taxation. Alaska could only boast of a couple of pulp mills. There were a few producing oil and gas wells, possibilities of hydroelectric power development, the likelihood of diversification in the fishing industry, some mining, and prospects for a vastly increased tourist trade. The State's business enterprises were small and catered mostly to local needs. In addition, Alaska's population was modest and hardly amounted to more than that of a medium-sized city in the continental United States.

[footnote continued]

The state puts forward two related purposes which revolve around "prudent management" of state resources. First, this classification system installs a greater motivation for the public to urge "prudent management" of the fund itself. Were the distribution made per capita, the state argues,

> as population increases, each individual share in the income stream is diluted. The income must be divided equally among increasingly larger numbers of people. If residents believed that twenty years from now they would be required to share

---

Accordingly, revenues were small. Yet, the demands were great. The State government had to provide all the governmental services and social overhead required by modern American society. For instance, it would have been relatively simple to build a few roads, furnish normal police protection, and establish the customary school facilities. But nothing was normal in Alaska; it was and remains a land of superlatives. Subarctic engineering is relatively new, but the State would have to face the problem of permafrost conditions that frequently cause the roadtop to buckle and heave. Police protection would have to be provided for an area one-fifth the size of the forty-eight United States but with very few roads available. Flying would become a way of life for law enforcement officials as well as other Alaskans—an expensive way of life. 'Bush schools' scattered along the Aleutian chain, through the Yukon Valley, and on the Seward Peninsula and the islands of southeastern Alaska were expensive to maintain. It was not until the discovery of oil on a large scale that the picture changed.

C.-M. Naske, An Interpretative History of Alaskan Statehood 169-70 (1973).

Given that the state's first years were its leanest, during which its few residents tolerated the heavy burdens of implementing the new state government, we believe that selection of the 1959 date is justifiable.

permanent fund income on a per capita basis with the large population that Alaska will no doubt have by then, the temptation would be great to urge the legislature to provide immediately for the highest possible percentage return on the investments of the permanent fund principal, which would require investments in riskier ventures. . . .

Under AS 43.23, each resident will receive an increasing number of dividends the longer he or she resides in the state. Each person's share will have increased substantially after twenty years, instead of having been diluted as it would have been under a per capita distribution system. Under AS 43.23, all generations of residents, not only today's residents but future residents as well, will therefore have an interest in insuring that the permanent fund is managed prudently so that a healthy income stream will be available twenty, thirty, and forty years after they have begun to accumulate their individual dividends.

A similar point is raised by the state in regard to prudent management of the state's natural resources. A per capita distribution is more likely to encourage the public to press for immediate and rapid development of the state's mineral resources, as each set of dividend recipients would want to see as much revenue as possible flowing immediately into the fund. Allowing benefits to increase with residency installs a counterbalance to this motivation, in that each year's recipients may stand to gain more by slowing development somewhat and increasing the size of the dividend in subsequent years, when those residents will presumably be getting an additional dividend for their additional year of residency.

The superior court and the Zobels seem to have misunderstood this point. The superior court apparently interpreted the argument as meaning that granting full benefits to the newcomers would result in the newcomers putting pressure on the legislature.[38] This is the same misconception that is reflected in the Zobels' response:

> The idea that if new residents are treated fairly, they will just get greedy and try to drain the fund is without basis in logic or fact. It has no basis in the record and represents little more than a gratuitous insult to everyone who has not been here since 1959.

This fundamentally misconstrues the argument the state makes. All recipients, not just long-term or short-term residents, would be subject to these incentives and motivations.

We think that installing this "counterbalance" incentive system is a permissible goal, and that the classification system is fairly and substantially related to it.

Having assessed the factors on both sides of the *Erickson* scale, the balance must be struck. The guidance which can be gleaned on this point from prior case law is limited. This distribution scheme, and indeed the permanent fund itself, are novel solutions to an unusual problem created by several relatively recent

---

[38]The superior court said, "This argument, however, is insufficient under any standard of review to sustain a distinction based on length of residency. What is there to prevent those who would receive maximum benefits under this statute from making similar demands on the legislature?"

political concerns. The convergence of these concerns—administering and husbanding Alaska's new-found wealth, avoiding the "cost-free" expansion of government, coping with an acute population turnover problem, and containing and counterbalancing the push for immediate development of Alaska's resources—has been dealt with legislatively by enacting a relatively simple, but unusual, distribution scheme. Unlike the tax exemption statute, this program has little or no precedent in American political thought.

If the privileges and immunities cases indicated that a distinction drawn between residents and nonresidents would be impermissible for a benefit distribution plan like this one, we would have an *a fortiori* argument that such a classification based on term of residency would be impermissible.[39] However, our reading of the applicable law leads us to conclude that a state would be justified in drawing a distinction between residents and nonresidents in distributing the permanent fund earnings dividends.[40] *See Baldwin v. Fish & Game Commission of Montana,* 436 U.S. 371, 56 L.Ed.2d 354 (1978); *cf. Califano v. Torres,* 435 U.S. 1, 55 L.Ed.2d 65 (1978); *Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), *aff'd without opinion,* 401 U.S. 985, 28 L.Ed.2d 527 (1971). This does not make the distinction drawn here automatically permissible; it merely means

---

[39]See Williams v. Zobel, ____ P.2d ____, ____, Op. No. 2170 at 38-41 (Alaska, September 19, 1980) (Rabinowitz, C. J., concurring).

[40]Were the permanent fund earnings distribution payments tied to "basic necessities," the rule of *Shapiro v. Thompson* would apply; but such is not the case.

that simple residency requirement cases do not provide clear guidance.

The case law does inform us that since "we deal here with a constitutional attack upon a law providing for governmental payments of monetary benefits [,s]uch as statute 'is entitled to a strong presumption of constitutionality:' " *Califano v. Torres,* 435 U.S. 1, 5, 55 L.Ed.2d 65, 69 (1978), *quoting Mathews v. De Castro,* 429 U.S. 181, 185, 50 L.Ed.2d 389, 394 (1976); *see also Fisher v. Reiser,* 610 F.2d 629 (9th Cir. 1979).

Beyond that general principle, the case law is less helpful here than in the balancing of the tax exemption scheme.[41] Given that this distribution system works no infringement on the exercise of the right of interstate migration, the purposes put forward by the state need not be as strong as would be required if the provision penalized the exercise of that right. On that basis, coupled with our conclusions that the purposes put forward by the state are legitimate and sufficiently weighty, and that the classification system has a fair and substantial relationship to these purposes, we conclude that the permanent fund income distribution statute is constitutional.[42]

---

[41]Were we continuing to adhere to the broader language in the pre-*Erickson* opinions dealing with the right of interstate migration, they might well be dispositive; but we have elected not to apply the strict scrutiny analysis.

[42]The dissent points out possible infirmities of the statute as applied to minors. We think it unnecessary to address those issues at this point. The Zobels have not complained concerning that aspect of the statute, and would have no standing to do so.

[footnote continued]

Thus, for the foregoing reasons we conclude that the permanent fund income distribution statute is valid under both the Alaska and United States Constitutions.

The judgment of the superior court as it pertains to the constitutionality of the permanent fund statute is therefore Reversed.

The parties have not briefed the issue. The mode of analysis would be substantially different than that applied to right-to-migrate cases. Therefore, we think it best to defer comment on this aspect of the statute until the question is presented in an adversarial context.

BURKE, Justice, Concurring.

I have serious reservations about certain aspects of the permanent fund dividend distribution plan, AS 43.23. Among these, it appears questionable to me whether the plan satisfies the "public purpose" requirement of article IX, section 6, of the state constitution.[1] That section provides, in part: "No . . . appropriation of public money [shall be] made . . . except for a public purpose." I think a strong argument can be made that the plan is one that amounts to "the giving away of public assets without any corresponding discernible benefit,"[2] and that it, therefore, should be struck down. *Compare Wright v. City of Palmer*, 468 P.2d 326, 330-31 (Alaska 1970); *Walker v. Alaska State Mortgage Assoc.*, 416 P.2d 245, 251-53 (Alaska 1966);

---

[1] I am troubled too by the plan's treatment of residents under the age of eighteen years. It clearly recognizes that such persons have an equitable interest in the plan, since at age eighteen they are entitled to claim one dividend for each prior year of residency. The problem is that during those prior years, unlike persons eighteen and over, they will receive no direct financial benefit *solely because of their age.*

Traditionally, of course, we have treated children as a separate class. Under various rationales we have denied children many things that could not be denied their elders without violating the latter's constitutional rights. One good example would be the right to vote. Whether one or more of these rationales would support the difference in treatment seen in Alaska's permanent fund dividend distribution plan is at least open to serious question.

This issue, however, is not squarely before us. Thus, it need not be decided. I mention it only because I find it troublesome and, perhaps, worthy of consideration by the legislature or other interested parties.

[2] Wright v. City of Palmer, 468 P.2d 326, 331 (Alaska 1970).

Suber v. Alaska State Bond Committee, 414 P.2d 546, 551-52 (Alaska 1966); *Lien v. City of Ketchikan*, 383 P.2d 721, 722 (Alaska 1963); *De Armond v. Alaska State Development Corp.*, 376 P.2d 717, 721-22 (Alaska 1962). This aspect of the plan has been largely ignored, both by the parties and my colleagues at the bench.

I am persuaded, nevertheless, to concur in the conclusion that the plan should be upheld.

> The role of the courts in matters of this kind is relatively limited. Our function is not to determine whether, as prudent burghers, we might think this plan wise. [Citation omitted.] The test that we must apply is whether the plan is so unreasonable as to transgress the limitations of our constitution.

Wright v. City of Palmer, 468 P.2d at 331. We "will not set aside the findings of the legislature [that a public purpose will be served] unless it clearly appears that such finding is arbitrary and without any reasonable basis in fact." *De Armond v. Alaska State Development Corp.*, 376 P.2d at 721. Since I cannot say that such is the case here,[3] I concur in the opinion of the Chief Justice.

---

[3]The legislature's enactment of the permanent fund dividend distribution plan, AS 43.23, was preceded by the following statement:

> Section 1. POLICY, PURPOSES AND FINDINGS. (a) It is the duty and policy of the state with respect to the natural resources belonging to it and the income derived from those natural resources to provide for their use, development, and conservation for the maximum benefit of the people of the state.
>
> (b) The purposes of this Act are

[footnote continued]

(1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;

(2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and

(3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund (art. IX, sec. 15, state constitution).

(c) The legislature finds that the accrual of permanent fund dividends provided in AS 43.23 enacted in sec. 2 of this Act, based on full years of residency since January 1, 1959, fairly compensates each state resident for his equitable ownership of the state's natural resources since the date of statehood. It is in the public interest to distribute a portion of Alaska's energy wealth to the people of the state.

(d) The legislature also finds that state residents have been paying increasingly high prices for fossil fuels, while few have received direct monetary benefits from the production and development of fossil fuels belonging to them as Alaskans. It is in the public interest to return to state residents a portion of the state's income from oil, gas, and other mineral production to help offset rising fuel costs.

(e) The legislature also finds that there exists in the state a serious problem of population turnover. A substantial portion of the state's population is comprised of individuals who reside in Alaska for only a relatively short time. This constant turnover in population leads to political, economic, and social instability and is harmful to the state. It is in the public interest for the state to promote a stable resident population by providing an incentive to encourage Alaskans to maintain their residency in the state.

Ch. 21, §1, SLA 1980.

DIMOND, Senior Justice, joined by Matthews, Justice, dissenting.

I dissent from the majority's holding that the permanent fund dividend program, AS 43.20.010-.100 (Ch. 21, SLA 1980) is constitutional. I do so on the grounds that, under the equal protection clauses of the United States and Alaska Constitutions, first, the state may not impose an unlimited durational residency requirement, and second, the state may not award dividends in the interest derived from the permanent fund retrospectively back to statehood.[1]

I

When the only difference separating the $1,050.00 that one resident will receive this year from the $50.00 received by another is twenty years of residency in the state, I do not believe that the present distribution system can be characterized as imposing anything other than a lengthy, and in fact, an open-ended, durational residency requirement. I believe this violates the equal protection clauses of both the United States and the Alaska Constitutions. This is so even though the benefit involved here may not be as important as some of the other rights or benefits conditioned on periods of residency that have been considered in past decisions.

A statute imposes a durational residency requirement when it creates distinctions between residents on the

[1]While this statutory scheme is not retroactive because it is effective beginning only this year, rather than as of 1959, I believe the scheme is retrospective in the sense that it requires looking to the past to determine the number of dividends each resident will receive—one for each year of residency in Alaska since 1959.

basis of their length of residency.[2] Ordinarily, durational residency requirements create two classes of residents. One class receives a particular benefit because its members have resided in the state for more than a specified period of time, while the other class is denied the same benefit because its members have not resided in the state for the specified period of time. The statute in question in this case does not create the usual durational residency requirement. All residents of Alaska over eighteen years of age are immediately eligible to share in the income from the permanent fund. However, by the terms of this statute, the number of years a person has been a resident of Alaska, determines how large his or her share will be each year in the income from the fund. Thus, the statute specifically creates distinctions between residents based upon the duration of their residency in Alaska.[3] A statute creating such distinctions can only be identifed

---

[2] *See* Dunn v. Blumstein, 405 U.S. 330, 334-35, 31 L.Ed.2d 274, 279-80 (1972); Shapiro v. Thompson, 394 U.S. 618, 627, 22 L.Ed.2d 600, 611 (1969).

[3] This is illustrated by the following example: X is a twenty-five year old resident of Alaska who moved to the state one year ago. Y is a twenty-five year old life-long resident of Alaska. X and Y are both residents of Alaska but when permanent fund benefits are calculated, X will receive one dividend while Y will receive twenty-one. X will never catch up to Y because she has exercised her fundamental right to travel, nor will X's benefits ever be equal to those of Z, a twenty-five year old, ten-year resident of the state for the sole reason that X exercised her fundamental right at a later point in time than did Z. Because these classifications act to penalize those residents who have recently exercised their right to travel by denying them benefits equal to those received by longer term residents they are, in effect, durational residency requirements.

as one which imposes a durational residency requirement.

The decisions of the United States Supreme Court dealing with durational residency requirements establish that such requirements are constitutionally permissible in certain cases, either as an element of proof that one is a bona fide resident, *Vlandis v. Kline*, 412 U.S. 441, 453, 37 L.Ed.2d 63, 72 (1973), or for other legitimate state interests, *Sosna v. Iowa*, 419 U.S. 393, 406, 42 L.Ed.2d 532, 544 (1975). But it has never been questioned that durational residency requirements, when valid, must be reasonable in length. Thus, Mr. Justice Stewart, writing for the Court in *Vlandis*, stated, "Nor should our decision be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a *reasonable* durational residency requirement, which can be met while in student status." 412 U.S. at 452, 37 L.Ed.2d at 72 (footnote omitted) (emphasis added). When durational residency requirements have been struck down, the dissenters who would permit the requirements have usually been careful to note their views that such requirements must be reasonable in length. Chief Justice Warren, joined by Justice Black, dissenting in *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600 (1969), three times noted his view that Congress could authorize the states to impose "*minimal* residence requirements." 394 U.S. at 644, 646, 648, 22 L.Ed.2d at 621, 622, 623 (emphasis added). In the same case, Mr. Justice Harlan in dissent stated:

> Nor do I believe that the period of residence required in these cases—one year—is so excessively long as to justify a finding of unconstitutionality on that score.

394 U.S. at 677, 22 L.Ed.2d at 640. Similarly, Chief Justice Burger, dissenting in *Dunn v. Blumstein*, 405 U.S. 330, 363, 31 L.Ed.2d 274, 296 (1972), expressed his view that a "*reasonable* period" (emphasis added) could be imposed on newcomers before granting them their voting franchise.

In my view, the underlying premise of the United States Supreme Court in these cases is that while durational residency requirements may be imposed for legitimate purposes, once the durational requirement is fulfilled, it is not permissible beyond that point for a state to allocate its resources or benefits on the basis of length of residency. If such treatment were permissible the requirement that durational residency periods be reasonable and limited in scope would lose most of its meaning. Thus, the state could impose a limited durational residency requirement, such that all persons must be residents of Alaska for some reasonable time period before they may share in the dividend program. However, I believe that once this requirement is fulfilled, all residents must be treated equally; that is, all residents must receive the same payments under the dividend program.

II

The majority apparently agrees with the state's contention that the present disparities in payments[4] caused by awarding dividends from the permanent fund's income on the basis of years of residency are justified. This is so because, the state says, "Oldtimers will die or move away and today's new residents will become tomorrow's oldtimers," and "[i]t is the difference between looking at two residents in a still photograph or looking at them along with all other residents as participants in a motion picture."

I do not regard this argument as valid. It is logically impossible to test the effects of a program which differentiates between people based solely on their length of residence without using the same future period of residence for all people in the sample. Thus we can make sense of an hypothetical case involving two forty-year old Alaskans one of whom has lived here twenty years and the other ten years, who will both die after living here for another ten years.[5] However, if we alter the case and assume that the second person will live here for thirty years then the two people have not been, by definition, similarly situated and there is no

---

[4] The disparity in payments between old and new residents will grow larger in the near future because the size of the dividend payment is predicted to increase. Gross dividends for 1980 and 1981 are estimated to be $130 million. The Alaska Department of Revenue has estimated that gross dividends will grow to $479 million by 1986. Alaska Economic Information and Reporting System, Quarterly Report at 12 (July 1980).

[5] In this case the first always will receive substantially more money than the second over the ten year period ($5,000 at current rates) or any other period one may care to posit.

reason to expect them to have received, in the aggregate, equal funds.

The state's argument is no different than arguing that a new resident who is not eligible for welfare because he does not meet a one year residency requirement is not treated differently from a one year resident who receives welfare because the former may remain in the state longer than the latter. This argument, of course, has been rejected by *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600 (1969), and deserves no better treatment here.

Moreover, not only is the argument logically wrong, it is based on assumptions which are contradicted by the state's current projections. The majority suggests that a new resident who stays in the state until the year 2001 will be better off than today's long-term resident. I do not think that this is a realistic assumption, and certainly it is not one that is supported by existing data.

Alaska is now in a position where it will earn, for at least the next ten years, an unprecedented surplus of funds from oil and gas taxes and royalties. Projections show, though, that after a peak in earnings around 1990, revenue will drop off as Prudhoe Bay—the state's main source of revenue—is depleted.[6] Meanwhile, population growth is expected to continue steadily.[7] The implication of these projections is that government

---

[6] *See* Alaska Dep't of Revenue, Petroleum Revenue Div., Petroleum Production Revenue Forecast Quarterly Report 1-2 (June 1980).

[7] *See* Alaska Dep't of Labor, Alaska Population Overview 11 (1979).

spending will need to expand to provide services for a growing population at a time when the sources of revenue needed to fund these programs will be decreasing.[8] Future legislatures, which as the state conceded are not bound to continue the dividend program, are likely to find that it will be impossible to pay dividends because all the interest from the permanent fund will be required to pay the costs of general government.

It is thus possible to surmise that the next few years will be the key period for participation in the dividend program. During this period dividend payments will be made at a time when the state will have enough of a budget surplus that use of permanent fund interest to fund state government will not be necessary, while the population receiving dividends will still be relatively small.

But the award of dividend payments for each year of residency since Alaska became a state in 1959 does not contemplate only one payment this year of accumulated dividends. What the statute provides for is the continued accumulation of dividends for each year in the future. Thus, one who has now been a state resident since 1959 will receive this year twenty-one

---

[8] The majority impliedly recognizes the truth of these projects. Thus, they say,

> Alaska's oil and mineral wealth is based on nonrenewable resources which will become depleted at some point in the future, potentially leaving Alaska with the choice of either terminating certain governmental programs or continuing them through increases in taxation.

____ P.2d at ____, Op. No. 2201 at 10 (Alaska, Oct. 24, 1980).

dividends, or $1,050.00.[9] Next year, he or she will receive twenty-two dividends, the succeeding year, twenty-three dividends, and so forth. It follows from this that long-term residents of the state are likely to receive most of the benefits under the program.

By the time today's newly born or arrived residents have accumulated an equal number of dividends in the income from the permanent fund, the program may not exist in anything close to its present form. Besides probably receiving less money from the dividends, it is also likely that these residents will have to begin paying income taxes.[10] I do not mean to intimate that such a pessimistic forecast is certain to occur. But at the same time I think it is unrealistic to believe that the dividend program's continued viability in future years can serve as a justification for a disparity in payments today.

The majority seems to place some reliance on language in *Sosna v. Iowa*, 419 U.S. 393, 406, 42 L.Ed.2d 532, 544 (1975), in which the United States Supreme Court suggested that denying a divorce to a new resident for a year would be permissible because it would not permanently deprive anyone of a right but would only delay its availability. Aside from the fact that a year prior to *Sosna* we rejected *Sosna*'s holding in *State v. Adams*, 522 P.2d 1125, 1132 (Alaska 1974), the delay involved in *Sosna* was only one year. In *Sosna* it was at least likely that new residents would achieve equality.

---

[9]The value of a dividend this year has been set at $50.00. Dividends are predicted to increase in value for a number of years in the future. *See* note 4 *supra*.

[10]The Alaska state income tax statute was repealed by the legislature at a special session in September, 1980.

I do not believe that *Sosna*'s logic can be extended to uphold a law that denies equal protection on the theory that the same benefit might be available as long as twenty years from now, since such a theory simply rests on speculation. I believe that the dividend distribution program must be examined from the perspective of what is in fact happening now, not from the perspective of the hopes and expectations the program might generate about the future. This is especially true of a program that depends, in large part, upon a finite, nonrenewable resource.

Assuming that strict scrutiny equal protection analysis is not appropriate when reviewing disparities in the award of a dividend payment, the balancing test in *State v. Erickson*, 574 P.2d 1 (1978), still requires that legislative classifications

> must be reasonable, not arbitrary, and must rest upon some difference having a fair and substantial relationship to the object of the legislation. . . .

Id. at 11, *quoting Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976) (emphasis omitted). Equal treatment of all Alaskans is the norm, not the exception, required by our constitution.[11]

---

[11] Article I, section 1, of the Alaska Constitution states:

> *Inherent Rights.* This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities and protection under the law; and that all persons have corresponding obligations to the people and to the State.

[footnote continued]

The statute offers three reasons justifying the present distribution system:

> [1] . . . to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state;
>
> [2] . . . to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund (art. IX, sec. 15, state constitution); [and]
>
> [3] . . . to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans.[12]

I cannot conclude that the reasons advanced by the legislature justify a retrospective distribution of state benefits.

First, as to the need to create an incentive to reduce population turnover, the state has argued at some

---

Additionally, article VIII, section 17, provides specifically with regard to disposition of the state's natural resources:

> *Uniform Application.* Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

Section 2 of this article requires the state to manage its natural resources "for the maximum benefit of its people." This is not the same thing as management for the maximum benefit of long-term residents. *See* Hicklin v. Orbeck, 565 P.2d 159 (Alaska 1977).

[12]Ch. 21, §1, SLA 1980. These sections are not in the order in which they appear in the statute's statement of purposes.

length that the money received from the dividends is too small in the beginning years of the program to attract new residents. If true, then the reverse seems to follow: the money involved is too small in the initial years to be of any real significance in making a decision to stay in the state. Consequently, I do not believe it can be argued that for newer residents of the state the program will have the effect of reducing population turnover. And as to long-term residents—principally those who have resided in Alaska since 1959—it is not at all unlikely that they had already committed themselves to remain in Alaska prior to the 1980 legislative enactment we are considering here. Thus, the need to create an incentive to reduce population turnover, specified as one of the purposes of the statute, does not really apply to long-term residents. By virtue of their length of residence in Alaska, it would appear unnecessary to give them the extra incentive to remain in the state by giving them the dividends from earnings of the permanent fund.

I can understand why in some circumstances the state might desire to reduce turnover within a particular group of the population.[13] But I cannot understand

---

[13]For example, free admission to pioneer homes, AS 47.25.020-.030, and a state longevity bonus, AS 47.45.010, both require lengthy residency periods. Both those programs, however, are apparently designed to help those individuals who would like to retire in the state but cannot do so because of the high cost of living. The state might well want to limit these benefits to those that would suffer the most hardship by being forced to leave, and it seems reasonable to suppose that a long period of residency would be some indicia of close ties to Alaska and the disruption that leaving might cause. AS 14.40.763 and AS

[footnote continued]

why all longer term residents should now be given this extra incentive to remain in the state when newer residents are not. I agree with the majority that the unstable nature of Alaska's population has created serious problems, but it seems obvious that the same problems are present regardless of which segment of the population is "turning over." Reducing population turnover can best be accomplished by giving all bona fide residents[14] an equal share in the income from the permanent fund. This objective cannot justify the present unequal distribution system.

As to the second purpose, that Alaskans should be interested in the manner in which the government manages the permanent fund, it seems reasonable to assume that those with the greatest interest in its management will be those receiving the most money from it. But I cannot understand why one group of residents should be given an incentive to be more interested than another. I believe that the awareness and involvement of all Alaskans in the management of the permanent fund could be encouraged most by

---

14.40.825 provide for forgiveness of student loans based on years worked in the state. In a state with a shortage of skilled manpower it seems reasonable to attract students to return to the state upon graduation to practice their profession.

[14]I believe a statute could require a reasonable period of residence in a state to establish the newcomer's bona fide residency before permitting the person to share in the dividend payments. *See* Vlandis v. Kline, 412 U.S. 441, 452, 37 L.Ed.2d 63, 72 (1973), where it is stated:

> Nor should our decision be construed to deny a State the right to impose on a [person] as one element in demonstrating bona fide residence, a reasonable durational residency requirement. . . .

giving all bona fide residents[15] an equal share of dividend payments. I do not believe this avowed purpose can justify awarding different numbers of dividend payments on the basis of length of residency.

Finally, the program is supposed to accomplish an equitable distribution of the income from the permanent fund. The state's principal contention in this regard is that it is equitable to reward past residency to the exclusion of any other consideration because length of residency approximates the contributions an individual has made to the state. I do not believe that a "past contributions" rationale can support the present distribution of benefits on either constitutional or equitable grounds.

The United States Supreme Court has twice indicated that a state may not allocate services or resources to its residents based on a past tax contributions rationale. Thus, in *Shapiro*, the Court stated:

> Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. . . . Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

---

[15] *See* note 13 *supra.*

394 U.S. at 632-33, 22 L.Ed.2d at 614. The last quoted statement was footnoted, and in the footnote the Court recognized an exception, stating:

> We are not dealing here with state insurance programs which may legitimately tie the amount of benefits to the individual's contributions.

394 U.S. at 633 n.10, 22 L.Ed.2d at 614 n.10. In view of the very limited scope of the footnoted exception, I do not think that a narrow construction of the language preceding the footnote is warranted.

In *Vlandis v. Kline*, 412 U.S. 441, 37 L.Ed.2d 63 (1973), the Court had before it a Connecticut statute denying lower residency tuition rates to college students who were nonresidents when they applied to the state university but who became residents while attending the university. The Court struck down the statute while indicating that a reasonable durational residency requirement could be imposed on a student "as one element in demonstrating bona fide residence." 412 U.S. at 452, 37 L.Ed.2d at 72. However, the Court expressed grave doubts as to whether Connecticut could impose a tuition scheme charging less to old residents than to new (assuming bona fide residence in both cases) in recognition of the fact that the old residents had contributed more to the state. The Court stated:

> But even if we accepted the State's argument that its statutory scheme operates to apportion tuition rates on the basis of old and new residency, that justification itself would give rise to grave problems under the Equal Protection Clause of the Fourteenth Amendment. For in Shapiro v. Thompson, supra, the Court rejected the contention that a challenged classification could be sustained as an

> attempt to distinguish between old and new residents on the basis of the contribution they have made to the community through past payment of taxes.

412 U.S. at 450 n.6, 37 L.Ed.2d at 70-71 n.6. It is true that the language in *Shapiro* and *Vlandis* to which I have referred concerns tangible contributions: namely, the payment of taxes. But I do not believe that the Court's reasoning would be any different if the argument had been based on intangible contributions.[16] I do not believe that rewarding past contributions is a

---

[16]The majority finds two cases persuasive when concluding that rewarding past intangible contributions is a permissible purpose. These are Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), *aff'd without opinion*, 401 U.S. 985, 28 L.Ed.2d 527 (1971), and Reeves, Inc. v. Stake, ____ U.S. ____, 65 L.Ed.2d 244 (1980). These cases do not seem persuasive to me. When, as the majority notes, Vlandis v. Klein, 412 U.S. 441, 37 L.Ed.2d 63 (1973), cites *Starns* with approval, it is because *Starns* upheld a statute that imposed a one-year residency requirement as "merely one element . . . to demonstrate bona fide domicile." 412 U.S. at 452 n.9, 37 L.Ed.2d at 72 n.9. Thus, the Supreme Court in *Vlandis* did not specifically approve of the district court's reliance on a past tax contributions rationale. Even if this rationale can support a one-year residency requirement, I do not believe it can justify the perpetual distinctions which the statute before this court creates between residents on the basis of their length of residency in Alaska. The second case, *Reeves*, involves an interpretation of the commerce clause. As the majority notes, *Reeves* "upheld South Dakota's policy of selling cement from its state-owned plant only to state *residents*." ____ P.2d at ____, Op. No. 2201 at 33 (Alaska, Oct. 24, 1980) (emphasis added). South Dakota did not impose a durational residency requirement which residents would have to fulfill before buying cement from the state-owned plant. Thus, I do not believe *Reeves* is persuasive authority when determining the validity of a durational residency requirement under the equal protection clause.

permissible objective for the same reason expressed in our decision invalidating the 1980 income tax statute:

> We believe that the reason the Supreme Court of the United States has indicated that it is not a "constitutionally permissible state objective," *Shapiro*, 394 U.S. at 633, 22 L.Ed.2d at 614, to apportion state benefits and services according to the past contributions of its citizenry, is that such a rationale logically could lead to pervasive and profound inequality in nearly all phases of a state's relationship with its citizens. That, in any event, is our view of the implications of the argument.

Williams v. Zobel, ____ P.2d ____, ____, Op. No. 2170 at 18 (Alaska, September 19, 1980) (plurality opinion).

As to the equity of such a distribution, I believe there must be equity for those younger, newer residents who have shown an inclination to settle in Alaska and make a commitment to the future of the state. I do not think the present program does this. I believe it has the effect of insulating long-term residents from sharing the state's oil wealth with newcomers during what is likely to be the critical years of the distribution of funds.

I think this statement applies to the children of Alaska as well. Take, for example, a one-year-old child whose parents have settled and lived in Alaska for some time and have committed themselves to make Alaska their home. The child is reared in Alaska, but under AS 43.23.010(b)(1) of the permanent fund statute, that child would not be eligible for a dividend until he or she is eighteen years old—which is seventeen years away. The rights of children are not protected under the program, so if it later becomes impossible to pay dividends the child would receive nothing. This can

hardly be considered an "equitable distribution of . . . the state's energy wealth to the people of Alaska." After all, children are "people," and, more importantly, are "persons" entitled to equal rights, opportunities, and protection under the law under article I, section 1, of the Alaska Constitution.

III

To summarize, it is undisputed that the retrospective aspects of this legislation will lead to large present disparities in payments. It is impermissible, in my opinion, to justify these disparities on the theory that they will be erased at some future time, because that is simply untrue as to people who are similarly situated except for their past length of residency, and further because such a theory is uncertain and speculative in nature. This latter reason is especially forceful since the program depends primarily on the existance of a nonrenewable resource that one can reasonably assume will be exhausted in the not too distant future.

As indicated above, the state contends that three objectives justify the present disparities. Two of them—that of population turnover and the incentive to manage the permanent fund wisely, can best be accomplished by giving both long-term and short-term residents basic equality when distributing income payments from the earings of the permanent fund. These objectives cannot justify the retrospective payment of dividends. The third objective, that of rewarding past contributions, raises serious federal and state constitutional equal protection issues. In considering the test of *State v. Erickson*, 574 P.2d 1 (1978), it is not necessary to consider any of these objectives in

the final balancing approach used in that opinion. Two of them are plainly insufficient and the third, in my opinion, is not a legitimate state purpose.

Finally, I have grave reservations as to whether even prospective operation of this program would be valid. Although not presenting the same questions as the retorspective operation of the statute, I believe it is impermissible to create perpetual distinctions between classes of residents, as newcomers become state residents in the future.

The state's concern that our unique benefit programs should not serve as a "magnet" may well be justified. But I think that any distribution of state benefits must treat all bona fide Alaska citizens equally after a reasonable period of residence in the state.

I agree with Presiding Superior Court Judge Moody that the permanent fund distribution statute, in its present form, is unconstitutional as violating the equal protection clause of the Alaska Constitution, article I, section 1. I also believe that the statute violates the equal protection clause of the United States Constitution.

APPENDIX B

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 5400

RONALD M. ZOBEL and PATRICIA L. ZOBEL,
Husband and Wife,

Appellants,

v.

THOMAS WILLIAMS, COMMISSIONER OF REVENUE and STATE OF ALASKA,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ronald M. Zobel and Patricia L. Zobel, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Alaska, reversing the judgment of the Superior Court as to the constitutionality of the permanent fund distribution statute, entered on October 24, 1980.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

RESPECTFULLY SUBMITTED this 28th day of October, 1980.

CAMAROT, SANDBERG & HUNTER, INC.
Counsel for Appellants
By: Mark A. Sandberg
Mark A. Sandberg

This is to certify that a true copy of the foregoing was mailed this 28th day of Oct., 1980, to:
Susan A. Burke
Assistant Attorney General
State of Alaska
Department of Law
Pouch K, State Capitol
Juneau, Alaska 99811

By hand to:
Attorney General's Office
Civil Division
State of Alaska
420 "L" Street, Suite 100
Anchorage, Alaska 99501

/s/ Mark Sandberg
Mark A. Sandberg

APPENDIX C

Article IX, Section 15 of the Alaska Constitution

Section 15. Alaska Permanent Fund. At least twenty-five per cent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.

APPENDIX D

LAWS OF ALASKA
1980

Source	Chapter No.
FCCSSB 122	21

AN ACT

Providing for the payment of Alaska permanent fund income to state residents; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1, LINE 10

Approved by the Governor: April 15, 1980
Actual Effective Date: April 16, 1980 with Sections 1 and 2 retroactive to January 1, 1979.

AN ACT

Providing for the payment of Alaska permanent fund income to state residents; and providing for an effective date.

*Section 1. POLICY, PURPOSES AND FINDINGS. (a) It is the duty and policy of the state with respect to the natural resources belonging to it and the income derived from those natural resources to provide for their use, development, and conservation for the maximum benefit of the people of the state.

(b) The purposes of this Act are

(1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;

(2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and

(3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund (art. IX, sec. 15, state constitution).

(c) The legislature finds that the accrual of permanent fund dividends provided in AS 43.23 enacted in sec. 2 of this Act, based on full years of residency since January 1, 1959, fairly compensates each state resident for his equitable ownership of the state's natural resources since the date of statehood. It is in the public interest to distribute a portion of Alaska's energy wealth to the people of the state.

(d) The legislature also finds that state residents have been paying increasingly high prices for fossil fuels, while few have received direct monetary benefits from the production and development of fossil fuels belonging to them as Alaskans. It is in the public interest to return to state residents a portion of the state's income from oil, gas, and other mineral production to help offset rising fuel costs.

(e) The legislature also finds that there exists in the state a serious problem of population turnover. A substantial portion of the state's population is comprised of individuals who reside in Alaska for only a relatively short time. This constant turnover in

population leads to political, economic, and social instability and is harmful to the state. It is in the public interest for the state to promote a stable resident population by providing an incentive to encourage Alaskans to maintain their residency in the state.

*Sec. 2. AS 43 is amended by adding a new chapter to read:

CHAPTER 23. PERMANENT FUND DIVIDENDS.

Sec. 43.23.010. ELIGIBILITY FOR PERMANENT FUND DIVIDEND. (a) An individual who is eligible under (b) of this section is entitled to one permanent fund dividend for each full year that the individual is a state resident after January 1, 1959.

(b) For each year, an individual is eligible to receive payment of the permanent fund dividends for which he is entitled under this section if he

(1) is at least 18 years of age; and

(2) is a state resident during all or part of the year for which the permanent fund dividend is paid.

(c) To determine the number of permanent fund dividends to which an individual is entitled under (a) of this section, a year in which the individual is a state resident for less than 12 months may not be counted, but a payment of a permanent fund dividend may be made for that year under (f) of this section. A year for which an individual was entitled to payment of a dividend but failed to file a claim may be counted to determine the number of dividends under (a) of this section.

(d) An individual may receive payment of a permanent fund dividend in a single payment or in 12 equal installments paid monthly by the department.

(e) An individual eligible to receive payment of a permanent fund dividend may elect to defer receipt of that payment. The commissioner shall adopt by regulation a plan which, to the extent permitted under federal law, will allow an individual to defer payment of federal and state income taxes on the payment of permanent fund dividends until the individual actually receives the payment.

(f) If an individual who is eligible under (b) of this section was a state resident for less than 12 months during the year immediately preceding the year in which a claim is filed, the individual is entitled to payment of one prorated dividend. If that individual is also entitled to dividends under (a) of this section based on previous years as a state resident, he is entitled to receive a prorated payment for the total number of permanent fund dividends to which he is entitled under (a) of this section. A prorated dividend or prorated payment under this subsection shall be prorated on the basis of the number of months that the individual was a state resident during the year immediately preceding the year in which the dividend is claimed.

Sec. 43.23.020. PROOF OF ELIGIBILITY. (a) The commissioner shall adopt regulations under the Administrative Procedure Act (AS 44.62) for determining the eligibility of individuals. The commissioner may require an individual to provide proof of eligibility, or he may use other information available to him from other state departments or agencies to determine the eligibility of individuals. The commissioner may establish procedures for paying the permanent fund dividends along with other payments of money or state benefits.

(b) The department may prescribe and furnish an application form for claiming a permanent fund dividend which contains

(1) a statement of eligibility and a certification of residency in substantially the following form:

> I certify that I am a state resident on the date of this application and I have been a state resident for _____ full years and that I understand that my claim for a permanent fund dividend is determined by the length of my residence in the state after January 1, 1959. I also understand that a false claim of residency to obtain a permanent fund dividend is a criminal offense and that if convicted I will forfeit all permanent fund dividends and that I must repay all permanent fund dividends which have been paid to me. I understand that this penalty is in addition to any criminal penalties imposed.
>
> (signature of individual)

and

(2) a statement advising the individual that he may choose to receive the payment of a permanent fund dividend in a single payment or in 12 installments payable monthly and a space where the individual may indicate his choice of payment.

Sec. 43.23.030. AMOUNT OF DIVIDEND. By December 1 of each year the commissioner shall give public notice of the value of each permanent fund dividend to be paid in the following year. The commissioner shall determine the value of a permanent fund dividend by

(1) determining the amount of income of the Alaska permanent fund transferred to the dividend fund under AS 43.23.050(b) in the current year, less the amount, if any, to be repaid in the current year to the general fund under AS 43.23.050(c);

(2) determining the number of permanent fund dividends paid during the current year; and

(3) dividing the amount determined in (1) of this section by the amount determined in (2) of this section.

Sec. 43.23.040. PENALTIES AND ENFORCEMENT. (a) In addition to any criminal penalties imposed by state law, if an individual is convicted of unsworn falsification for a statement made in a certification of residency made for purposes of this chapter, and the conviction is not reversed, that individual is not, and may never become, eligible for a permanent fund dividend, and he forfeits all permanent fund dividends paid to him.

(b) If the commissioner determines that a permanent fund dividend should not have been claimed by or paid to an individual, he may use any collection procedures or remedies available under this title to recover the payment of a permanent fund dividend which was improperly made.

Sec. 43.23.050. DIVIDEND FUND ESTABLISHED. (a) The dividend fund is established as a separate fund in the state treasury. The dividend fund shall be administered by the commissioner and may be invested by the commissioner in the same manner provided for the investment of the Alaska permanent fund under AS

37.13.120. Money in the dividend fund and any interest earned from investment of money in the dividend fund shall be used to pay permanent fund dividends annually and to repay loans from the general fund as provided in (c) of this section.

(b) Each year the commissioner shall transfer to the dividend fund 50 percent of the income of the Alaska permanent fund which was earned during the fiscal year ending on June 30 of the preceding year and which is available for distribution under AS 37.13.140.

(c) The legislature may annually appropriate money from the general fund to the dividend fund if there is not enough money in the dividend fund to pay each eligible individual an annual permanent fund dividend valued at $50. One-fifth of the amount transferred to the dividend fund each year under (b) of this section shall be annually withdrawn from the dividend fund by the commissioner and deposited in the general fund to repay appropriations made under this subsection.

Sec. 43.23.060. DUTIES OF THE DEPARTMENT. The department shall

(1) by the 10th day of each regular legislative session, present a request to the legislature for an appropriation from the general fund to the dividend fund to satisfy the requirements of AS 43.23.050;

(2) annually pay permanent fund dividends from the dividend fund;

(3) adopt regulations under the Administrative Procedure Act (AS 44.62) which establish procedures and time limits for claiming a permanent fund dividend; the department shall set the time limit for applications for permanent fund dividends so that single-payment

permanent fund dividends for a year are paid before October 15 of the following year and so that installment-payment permanent fund dividends for a year begin by October 15 of the following year; and

(4) assist residents of rural areas who because of language, illness, old age, or inaccessibility to public transportation need assistance to establish eligibility and to apply for permanent fund dividends.

Sec. 43.23.070. EXEMPTION OF PERMANENT FUND DIVIDENDS. (a) An eligible individual may assign, pledge, or encumber not more than 50 percent of the annual permanent fund dividends which are due and payable or which may become due and payable to the individual.

(b) Fifty percent of the annual permanent fund dividends payable to an individual is exempt from levy, execution, garnishment, attachment, and any other remedy for the collection of a debt.

(c) Fifty percent of the annual permanent fund dividends paid to an individual which are not held separately from other money of the individual is exempt from levy, execution, garnishment, attachment and any other remedy for the collection of a debt.

Sec. 43.23.080. ELIGIBILITY FOR STATE PUBLIC ASSISTANCE PAYMENTS. In determining the eligibility of an individual for old age assistance under AS 47.25.430-47.25.610, aid to the blind under AS 47.25.620 - 47.25.780, or aid to the permanently and totally disabled under AS 47.25.790 - 47.25.970, the Department of Health and Social Services may include as income of the individual only the amount of the

permanent fund dividends in excess of $1,500 paid to the individual for a year.

Sec. 43.23.090. TAX EXEMPTION. Permanent fund dividends provided under this chapter are excempt from taxation under AS 43.20.

Sec. 43.23.100. DEFINITIONS. In this chapter,

(1) "Alaska permanent fund" means the fund established by art. IX, sec. 15, of the state constitution;

(2) "commissioner" means the commissioner of revenue;

(3) "department" means the Department of Revenue;

(4) "dividend fund" means the fund established by AS 43.23.050;

(5) "individual" means a natural person;

(6) "permanent fund dividend" means a right to receive a payment of money from the dividend fund;

(7) "state resident" means an individual who is physically present in the state with the intent to remain permanently in the state or, if he is not physically present in the state, intends to return to the state and he is absent for the following reasons:

(A) vocational, professional or other special education for which a comparable program was not reasonably available in the state,

(B) postsecondary education,

(C) military service,

(D) medical treatment,

(E) service in Congress, or

(F) other reasons which the commissioner may establish by regulation under the Administrative Procedure Act (AS 44.62);

(8) "year" means a calendar year.

*Sec. 3. For 1979 the value of a permanent fund dividend is $50. The payment of permanent fund dividends for 1979 shall be made from an appropriation from the general fund to the dividend fund for that purpose. The amount appropriated from the general fund to pay permanent fund dividends for 1979 less 50 percent of the income of the Alaska permanent fund earned during the fiscal year ending June 30, 1978, is a loan to the dividend fund from the general fund which shall be repaid as provided in AS 43.23.050(c) enacted by sec. 2 of this Act. The Department of Revenue shall by July 1, 1980, prescribe and make available an application form for claiming permanent fund dividends for 1979. The Department of Revenue shall mail the form to each individual who, before July 1, 1980, filed a resident or part-year resident Alaska net income tax return for the 1979 tax year under AS 43.20. An eligible individual may receive payment of permanent fund dividends for 1979 if he applies to the Department of Revenue on the form prescribed by the department no later than September 1, 1980. The application must be accompanied by a statement of eligibility as required by AS 43.23.020 enacted in sec. 2 of this Act.

*Sec. 4. If any provision enacted in sec. 2 of this Act is held to be invalid by the final judgment, decision or order of a court of competent jurisdiction, then that

provision is nonseverable, and all provisions enacted in sec. 2 of this Act are invalid and of no force or effect.

*Sec. 5. Sections 1 and 2 of this Act are retroactive to January 1, 1979.

*Sec. 6. This Act takes effect immediately in accordance with AS 01.10.070(c).

Office-Supreme Court, U.S.
FILED
JAN 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1146

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RONALD M. ZOBEL and PATRICIA L. ZOBEL,
Appellants,

v.

THOMAS WILLIAMS, Commissioner of Revenue,
and STATE OF ALASKA,
Appellees.

On Appeal from the Supreme Court of the State of Alaska

MOTION OF THOMAS WILLIAMS, COMMISSIONER OF REVENUE, AND STATE OF ALASKA TO DISMISS OR AFFIRM

WILSON L. CONDON
Attorney General
SUSAN A. BURKE
COUNSEL OF RECORD
Assistant Attorney General
AVRUM M. GROSS
Special Counsel to the Attorney General
State of Alaska
Department of Law
Pouch K, State Capitol
Juneau, Alaska 99811
(907) 465-3600
Counsel for Appellees

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7682

TABLE OF CONTENTS

Page

I

Introduction 2

II

Argument 6

A. The permanent fund distribution plan does not infringe on the right of interstate migration 6

B. The Alaska Supreme Court correctly applied the doctrines established by this Court in determining that the purposes of the permanent fund dividend plan are valid, and that those purposes are rationally related to the particular means chosen to effect them 12

III

Conclusion 19

TABLE OF AUTHORITIES CITED

Cases

Page

Dunn v. Blumstein, 405 U.S. 330 (1972) 6, 7, 8, 9
Foley v. Connelie, 435 U.S. 291 (1978) 13
F. S. Royster Guano Co. v. Virginia, 253 U.S 412 (1920) 13
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 13
McGowan v. Maryland, 366 U.S. 420 (1961) 13
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 6, 7, 8, 9, 10, 15, 16, 17
New Orleans v. Dukes, 427 U.S. 297 (1976) 13
Shapiro v. Thompson, 394 U.S. 618 (1969) 6, 9, 10, 17
Sosna v. Iowa, 419 U.S. 393 (1975) 7, 8, 9
Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970) aff'd mem., 401 U.S. 985 (1971) 7, 17
Vlandis v. Kline, 412 U.S. 441 (1973) 7, 17

Rules

Rules of the Supreme Court of the United States:
Rule 16.1(b) 1
Rule 16.1(d) 1

Statutes

AS 43.23.010(a) 5
AS 43.23.010(f) 5
AS 43.23.030 6
AS 43.23.050(c) 6
AS 43.23.100(7) 5

No. 80-1146

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

RONALD M. ZOBEL and PATRICIA L. ZOBEL,
Appellants,

v.

THOMAS WILLIAMS, Commissioner of Revenue,
and STATE OF ALASKA,
Appellees.

On Appeal from the Supreme Court of the State of Alaska

MOTION OF THOMAS WILLIAMS, COMMISSIONER OF REVENUE, AND STATE OF ALASKA TO DISMISS OR AFFIRM

Appellees Thomas Williams, Commissioner of Revenue, and the State of Alaska move this Honorable Court, pursuant to Rule 16.1(b) and Rule 16.1(d) of the Rules of the Supreme Court of the United States, to dismiss the above-captioned appeal of appellants Ronald M. Zobel and Patricia L. Zobel, as not presenting a substantial federal question; or alternatively, to affirm the judgment of the Supreme Court of the State of Alaska. Should the jurisdictional statement of appellants be deemed a petition for certiorari, the State respectfully submits that such petition should be denied for the reasons stated in this motion.

I

INTRODUCTION

This case involves the constitutionality of a plan by which some of Alaska's oil wealth is distributed directly to its citizens in the form of dividends. The plan is one of the cornerstones of Alaska's program for long term development of its natural resources. Every aspect of the plan has received careful review, first by the residents of the State who voted directly to save a portion of Alaska's oil wealth for future generations, then by the Alaska legislature which spent years refining a plan to insure that present and future residents would share in that wealth, and finally by the Alaska Supreme Court which upheld the constitutionality of this dividend distribution plan. The plan itself is at the heart of this litigation, and before the legal issues concerning the plan can be viewed in proper perspective, it is necessary to understand the nature of the dividend distribution plan and the circumstances that led to its creation.

In 1976, the citizens of the State of Alaska adopted a constitutional amendment establishing a Permanent Fund. The fund is comprised of a percentage of the rentals, royalties and lease sale proceeds received from oil and gas development in the State. The principal of this fund may not be appropriated by the legislature for any purpose; only the earnings from investment of the principal may be utilized for government programs.

The Permanent Fund was created for two basic reasons. First was a recognition of the fact that the oil wealth available to Alaska today is limited in duration—that unlike funds generated by development of renewable resources

such as timber or fish, revenues from oil development will end at some fixed time. Government programs established from today's oil wealth will in the future require funding from other sources, which may or may not be available. Accordingly, steps had to be taken to insure that ongoing government programs did not become dependent on limited oil wealth. By placing a portion of the oil revenues in a constitutionally protected fund, and by permitting only the sustained earnings from the fund to be appropriated for government services, Alaskans insured that these services could continue for themselves and future residents far past the time when the oil itself is gone.

The Permanent Fund was also a response to a related public concern that large amounts of temporary resource wealth would encourage some political leaders to court the electorate with costly government projects which, in the end, would prove wasteful. The placement of at least a portion of oil revenues into a permanent fund helps prevent that waste.

The creation of the Permanent Fund solved some problems but it created others. Even the earnings from the fund are substantial, creating similar concerns over the waste of money and the unwarranted growth of government. Government growth is a concern everywhere, but in Alaska the problem has a peculiar twist. In most states, increases in government expenditures are irrevocably tied to an increase in individual taxes—a political debit to counterbalance the benefits bestowed by any new program. In Alaska, however, since public revenues can be raised easily by selling oil leases, personal taxes need not be imposed, and there is

no counterbalancing debit. New government programs can be established without ever affording the electorate a clear political choice. But increased government has social and political implications that *should* require political choices. A major Alaskan issue then has been how to create those choices—how to bring home to people the fact that it is money from development of *their* resources that is used to increase government.

The solution was unique in its simplicity. Instead of leaving the way open for all of the earnings from Permanent Fund principal to be used for funding new government programs, a portion of the earnings would be distributed directly to the people in the form of dividends. If subsequent legislatures chose to create new programs, they would be required to fund those programs by using money which otherwise would be distributed to the people. It was a system set up to duplicate the choices the legislature must make when it raises individual taxes to fund new government programs—a method of creating a constituency with an interest in overseeing the growth of government because with that growth would come a corresponding decrease in dividends received.

Direct distribution of Permanent Fund income however, posed the danger of stimulating enormous pressures by present day residents to maximize the earnings from the Permanent Fund immediately by developing resources at the most rapid possible rate and by investing Permanent Fund principal in high yield but risky investments. This

might benefit present Alaskans well, but would do a disservice to generations of future Alaskans.[1] The Alaska legislature concluded that the pressures for rapid and imprudent resource development could be best reduced by selecting a particular method of dividend distribution under which all residents would receive the same annual dividend, but dividends would be cumulative. The total amount received in any year, then, would increase over time, which in turn would give residents a personal interest in long term prudent management of the resources and of the Permanent Fund itself. At the same time the legislature realized that this method of distribution would accomplish other desired legislative purposes. It would provide an incentive for people to make Alaska their long term residence, and it would recognize the contributions that residents, past, present and future, have made and will make to the Alaska community.[2]

---

[1]This is a particularly serious problem when distributing wealth from finite non-renewable resources like oil. If all of the present benefits from a renewable resource like timber or fish were to be distributed today, there would be little danger that future residents would be deprived of similar benefits. But the benefits from oil are available only so long as the oil remains. As trustee of the State's natural resources, today's government has an obligation to insure that tomorrow's residents will benefit at least in part from this finite resource.

[2]Under the dividend distribution plan adopted by the legislature, one-half the interest from the permanent fund is distributed on an annual basis to residents of the State. Each eligible person is entitled to claim annually one dividend for each full year of residence in the State since Statehood. AS 43.23.010(a). There is no durational residency requirement. A new resident qualifies immediately for a pro-rated portion of the first year's dividend upon becoming a resident of the State. AS 43.23.010(f), and AS 43.23.100 (7). The value of each dividend is computed each year on the

The permanent fund dividend program affords every resident of Alaska the same dividend for any year of residence, but a person who has been a resident of the State for a longer period than another will receive greater total amounts in any one year, because the dividends are cumulative. The appellants here have focused on that differential, asserting that since residents will receive differing amounts in any one year, the plan is in the nature of a durational residency requirement, one that is "inconsistent with the right to equal protection and the right of interstate migration." Appellants' Jurisdictional Statement, at p. 5.

II

ARGUMENT

A. The Permanent Fund Distribution Plan Does Not Infringe on the Right of Interstate Migration.

Appellants' claim that the dividend distribution plan infringes on their right to interstate migration, relies exclusively on a series of cases which deal with the question of whether states may single out newly arrived residents and deny them benefits which are available to all other residents. *Shapiro v. Thompson,* 394 U.S. 618 (1969) (one year residency requirement for welfare invalid); *Dunn v. Blumstein,* 405 U.S. 330 (1972) (one year residency requirement to vote invalid); *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974) (one year residency re-

---

basis of one-half of the permanent fund income earned during the previous fiscal year divided by the total number of dividends paid during the most recent annual distribution. AS 43.23.030. If this figure for any one year is less than $50, the legislature is authorized to make a loan from the general fund to the dividend program sufficient to make the distribution at $50 per dividend. AS 43.23.050(c).

quirement for medical care invalid); *Sosna v. Iowa,* 419 U.S. 393 (1975) (one year residency requirement for divorce valid); *Starns v. Malkerson,* 326 F.Supp. 234 (D. Minn. 1970), *aff'd mem.,* 401 U.S. 985 (1971) (new residents may be required to pay higher tuition at a state university for one year). The theory underlying all of these cases is, in essence, that distinctions between established and newly arrived residents of a state must be justified by a "compelling state interest" when the distinctions penalize a basic and separate constitutional right—the right of interstate migration. The Court in *Dunn* put it this way:

> Durational residency laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right. In the present case, such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote. Absent a compelling state interest, a state may not burden the right to travel in this way.

405 U.S. at 342 (footnote omitted; citation omitted.)

This Court has made it clear, however, that not all distinctions among residents of a state burden the right of migration between the states. By its memorandum decision affirming a district court opinion in *Starns v. Malkerson,* 326 F.Supp. 234 (D. Minn. 1970), *aff'd mem.,* 401 U.S. 985 (1971), and in *Vlandis v. Kline,* 412 U.S. 441, 452 (1973), the Court recognized that it was permissible for states to require new residents to pay higher tuition at a state university than that paid by longer term residents—a distinction justified by an assumption of past tax contributions by long term residents. In *Memorial Hospital v. Maricopa*

County, 415 U.S. 250 (1974), the Court commented that the right to travel is penalized only when recent migrants are denied "fundamental necessities of life." Most recently, in *Sosna v. Iowa*, 419 U.S. 393 (1975), the Court held that a statute which denied recent migrants access to the divorce courts for one year did not infringe on the right to travel. In *Sosna*, the Court found that Iowa's interest in controlling domestic relations in the State formed a rational basis for the waiting period. In addition, the Court concluded that a one-year waiting period for obtaining a divorce was reasonable, since unlike welfare or medical treatment for the poor, the need to use the divorce courts of the state was neither urgent nor immediate.

The method of dividend distribution at issue here is fundamentally different from the durational residency requirements in right to travel cases. The first difference is that the provisions of the dividend program apply uniformly to all residents. In *Dunn*, for instance, the Court held the onus of durational residency laws to be that they burdened the right to travel "by imposing their prohibitions on only those persons who have recently exercised that right." 405 U.S. at 342. The distinctions made in the permanent fund dividend plan, however, are *not* focused on newly arrived residents. A resident who has been in Alaska 10 years receives a different number of cumulative dividends than an eight year resident or a 15 year resident. These differences must be rationally justified, but it is critical to recognize that newly arrived residents are treated no differently than any other resident of the State—they qualify immediately for the same annual dividend and

enjoy the same right of accumulation as all other residents of the State.

The second major difference lies in the type of benefit conferred by the dividend plan. In the terminology of prior decisions by this Court, there is no "fundamental necessity of life" involved here, however broadly that term may be interpreted. This is not a case in which, through denying some service, the government penalizes or inhibits migration. Unlike medical benefits (*Maricopa County*), welfare (*Shapiro*), the right to vote (*Dunn*), or even the right to obtain a divorce (*Sosna*) all of which were withheld from recent migrants in right to travel cases, nothing at all is "prohibited" here. Prospective migrants need not "choose" as they consider a move to Alaska. *Dunn v. Blumstein, supra,* at 342. The only question is what additional benefits they will *gain*—the precise amount of a unique annual dividend bestowed only upon those who live in Alaska. There is no penalty on interstate migration—nothing remotely resembling the situation in *Shapiro, Maricopa County* or *Dunn.* If anything, the permanent fund dividend program provides an incentive for persons to exercise their right to migrate to Alaska.

Finally, and perhaps most important, the impact of the dividend plan provides a vivid contrast to previous durational residency cases. The permanent fund dividend plan distributes surplus oil revenues to residents using a distribution method that is designed to achieve long range goals—to insure that benefits accrue not only to present-day residents of Alaska, but to residents who have not yet come to the State. Each new resident receives exactly the same

rights of accumulation as those who have come before. If he remains a resident for the same period of time as another resident, he will receive the same amount of accumulated dividends. If a new resident does not reside in Alaska as long as another, he will receive less in the aggregate. But that will be the case whatever system of distribution is utilized. Even under the per capita system urged by appellants, a 10 year resident over the period of his residency will receive half as much as a 20 year resident and ten times as much as a one year resident. This disparity results from the fact that participation in the program arises simply from being a resident, which in turn gives rise to an interest in the resources. Persons who reside in the State for equal periods of time receive equal dividends, either under a per capita system or the cumulative system adopted in this plan. Under the cumulative system, the difference between the amount a new resident will receive initially and the total amount already received by a resident who arrived earlier is greater than it would be under a per capita system. But if the new resident lives in Alaska for the same total number of years as one who arrived earlier, the new resident makes up the initial difference in exactly the same period of time as he would under a per capita system, because he accumulates dividends at a higher rate. Under the cumulative system, equality is achieved in the aggregate, just as it would be under a per capita system.

The concept of equality in the aggregate would, of course, be meaningless if applied to the type of government programs at issue in *Shapiro* and *Maricopa County*. It makes no sense in the area of medical care to suggest that though someone does not qualify today because he has not

lived in the State long enough, he will qualify for similar medical care at a later time. If someone is sick, he needs the care today—what will happen later is irrelevant. Welfare benefits are similarly based on present need—a need that must be met now. The purpose of welfare, medical care or similar programs is to deal with present individual need. For those programs the appropriate basis of comparison to determine whether similarly situated persons are treated equally is obviously the similarity of the needs of both long-term and newly arrived residents *at the time those needs exist,* and not the similarity of aggregate benefits that each may ultimately receive under the program. But the permanent fund dividend plan is of a different nature. It is not based on need, "fundamental" or otherwise.[3] It is, instead, a program based purely on the status of residency—a long-term plan to distribute resource wealth in a manner consistent with certain basic policy objectives—primary among them being a wise and cautious approach to the management and development of Alaska's resources so that this generation of residents will not be the only group to benefit from them. And since this is a

---

[3]It is certainly true that many residents, particularly Alaska Natives living in outlying communities and maintaining a limited subsistence lifestyle, were counting on using their dividends to enhance their cash incomes during the winter months. *See,* Affidavit of Thomas K. Williams, at p. 5, Appellees' Opposition to Stay. But any "need" felt by those residents was a result of having planned to receive their dividends and of having structured those dividends into their financial plans. The purpose of the dividend distribution is not aimed at relieving economic hardship or providing economic advantage. Obviously there is wide variance in the personal economic situations of individual Alaskans, and each resident will use his dividends in accordance with his own particular individual needs and desires, whatever they may be.

distribution program with long term objectives unrelated to present need, it is entirely appropriate to compare its impact on residents over the long term.

This is not to say, of course, that the method selected by the legislature for the distribution of dividends can be an arbitrary one. Like any legislative classification, one between residents must be rationally related to valid legislative goals. But since this plan does not penalize or burden the right to travel and in fact involves no infringement on any Constitutional right, a compelling state interest is not required. It is only necessary that the relationship be rational.

B. The Alaska Supreme Court Correctly Applied the Doctrines Established by This Court in Determining That the Purposes of the Permanent Fund Dividend Plan are Valid, and That Those Purposes are Rationally Related to the Particular Means Chosen to Effect Them.

The purposes of the dividend distribution program were specifically outlined in the legislation enacting the program. Appendix D, p. 61a, Appellants' Jurisdictional Statement. A major purpose of the plan is to "encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund." Two additional purposes are set forth in the legislation—to provide "a mechanism for equitable distribution" of a portion of the State's natural resource revenues, and to reduce population turnover in the State.

Having concluded that the dividend distribution plan did not infringe on any fundamental Constitutional right, the

Alaska Supreme Court reviewed the distribution plan under the standards established by this Court in previous equal protection cases. *See, e.g., Foley v. Connelie,* 435 U.S. 291, 296 (1978) ("The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification."); *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights . . . our decisions presume the constitutionality of the . . . [statute] and require only that the classification challenged be rationally related to a legitimate state interest."); *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 814 (1976) (". . . a rational relationship . . . is all the Constitution requires."); *McGowan v. Maryland,* 366 U.S. 420, 425 (1961) (statute is invalid only if "the classification rests on grounds wholly irrelevant to the achievement of the State's objective."); *F. S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920) (". . . the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."). Applying these standards, the Alaska Court concluded that there was a "fair and substantial" relationship between the purposes of the dividend distribution plan and the method of distribution.

First, the Alaska Supreme Court found that this distribution plan, under which every resident earns the same annual dividend and accumulates dividends with increased residency, uniquely insures wise and careful management of the Permanent Fund and Alaskan resources over the long term. This can readily be seen by comparing this plan to

the most obvious alternative—a per capita distribution each year to all residents, regardless of length of residency. As the Alaska Court noted, a per capita distribution would tend to jeopardize the principal of the Permanent Fund:

> 'as population increases, each individual share in the income stream is diluted. The income must be divided equally among increasingly larger numbers of people. If residents believed that twenty years from now they would be required to share permanent fund income on a per capita basis with the larger population that Alaska will no doubt have by then, the temptation would be great to urge the legislature to provide immediately for the highest possible percentage return on the investments of the permanent fund principal, which would require investments in riskier ventures. . . .
>
> Under AS 43.23, each resident will receive an increasing number of dividends the longer he or she resides in the state. Each person's share will have increased substantially after twenty years, instead of having been diluted as it would have been under a per capita distribution system. Under AS 43.23, all generations of residents, not only today's residents but future residents as well, will therefore have an interest in insuring that the permanent fund is managed prudently so that a healthy income stream will be available twenty, thirty, and forty years after they have begun to accumulate their dividends.'

Opin., pp. 31a-32a, Appendix A, Appellants' Jurisdictional Statement.

At the same time, a per capita distribution of permanent fund income would tend to create public pressure for immediate and rapid development of the State's now unde-

veloped mineral resources. The Alaska Supreme Court described this effect as follows:

> A per capita distribution is more likely to encourage the public to press for immediate and rapid development of the state's mineral resources, as each set of dividend recipients would want to see as much revenue as possible flowing immediately into the fund.

The Alaska Court concluded:

> Allowing benefits to increase with residency installs a counterbalance to this motivation, in that each year's recipients may stand to gain more by slowing development somewhat and increasing the size of the dividend in subsequent years, when those residents will presumably be getting an additional dividend for their additional year of residency.
>
> . . . .
>
> We think that installing this 'counterbalance' incentive system is a permissible goal, and that the classification system is fairly and substantially related to it.[4]

Opin., pp. 32a-33a, Appendix A, Appellants' Jurisdictional Statement.

A second justification that the Alaska Court discussed for this method of dividend distribution stems from the

---

[4]The need to encourage sound long term management of the State's resources obviously goes far beyond mere "preservation of the public fisc," as appellants characterize this purpose, or a simple desire to save money on a particular program such as medical care for the poor. Appellants also suggest that as in *Maricopa County*, where officials argued that they could not gain political support to fund free medical care unless they barred new residents, this is a case where Alaska seeks to justify an otherwise impermissible classification on the basis that it will engender political support for the program. But here, unlike *Maricopa County*, there

legislature's view of what equity required in the distribution of resource revenues. The legislature believed that the contributions residents make through their participation in the Alaska community should be recognized by increasing the dividends they receive as their length of residence in the community increases. That, of course, does not mean that the plan is a vehicle for rewarding only the contributions made by already existing residents.[5] The distribution program recognizes that new residents will also contribute to the Alaska community since *every* resident from the instant he arrives begins to accrue the same benefits as one who has already lived in Alaska. Newer residents are in no

---

is no discrimination directed at new residents and no "otherwise impermissible classification." And here, unlike *Maricopa County*, there is no effort to gain the political support of one group by excluding another from benefits. The political incentives built into this program have nothing to do with gaining support for the dividend distribution. The incentives apply equally to all residents, old and new, and are aimed at achieving the valid, long term goal of insuring that Alaska's resources are developed in a prudent manner.

[5]The Alaska Court found that in distributing dividends equitably, it was reasonable for the legislature to consider not only the contributions that Alaska residents will make to the enhancement of the Alaska community in the future, but also those previously made by residents since statehood. The Court noted:

> 'Many [residents] have paid taxes; many have contributed to the economic life of the state; many have contributed to the cultural life of the state and have fostered the cultural diversity that makes Alaska so unique; many have contributed their ideas and have participated in the political life of the state; all have endured the rigors of a harsh climate; and all have borne the impact of a high cost of living.'

Opin. p. 22a, Appendix A, Appellants' Jurisdictional Statement.

different position than those who have preceded them in the State.[6]

It is important to stress that this is not a case like *Shapiro* where States attempted to justify a denial of necessary benefits to a new resident on the basis that he had not previously made contributions in the form of taxes to the State. That argument was obviously fallacious since present need has no logical relationship either to past payment of taxes or to length of residency. But the purpose of the permanent fund dividend plan is not to address any present need, be it "fundamental," as it was in the case of medical care (*Maricopa County*), or merely desirable, as in the case of higher education (*Starns v. Malkerson; Vlandis v. Kline*). Viewing the program purely from the narrow perspective of the individual benefits conferred (as opposed to the program's primary long range goals), it is truly a "bonus" of residency. The Alaska Court acknowledged that granting a "bonus" may not be appropriate when it infringes upon some fundamental right, but when no rights are infringed:

> . . . the state may recognize these contributions. The fit between means and ends need not be perfect. We

---

[6]Indeed, they are in a better position, as the Alaska Supreme Court recognized:

> . . . the new resident who arrives in 1980 and stays twenty-one years will not only get twenty-one dividends in 2001, but will have received a total of 210 dividends during the intervening years. In that respect also, the new resident may be better off, in that the twenty-one-year resident of 1980 receives twenty-one dividends in 1980, but no 'back payments' for the 210 dividends he or she would have received had the program been established in 1959.

Opin., p. 17a, Appendix A, Appellants' Jurisdictional Statement.

> think the relationship is fair and substantial. There clearly is a correlation between one's length of residency and the extent to which that individual has been able to make contributions to the community. We are not convinced that any workable alternative method of measuring past contributions is clearly preferable. Although the existence of a preferable alternative would not automatically render the relationship unfair or insubstantial, the absence of any preferable workable alternative is a strong indication that the classification chosen by the legislature is acceptable. We think that the relationship is as fair and substantial as the Alaska Constitution requires in this context.

Opin., p. 28a, Appendix A, Appellants' Jurisdictional Statement.

A final justification for the particular distribution method selected by the legislature is the goal of discouraging population turnover, a social problem that has plagued Alaska through its years of boom and bust with traditionally serious consequences. *See,* Opin., p. 23a, n. 33, Appendix A, Appellants' Jurisdictional Statement. The prospect of losing future dividend payments may not be enough by itself to stabilize the Alaska population, but a person has a strong incentive to maintain long term Alaska residence, since moving away means losing the substantial dividend payments that will have accumulated in future years.

The purposes of the dividend distribution plan have nothing to do with favoring the interests of old time Alaskans over the interests of new residents of the State. In contrast, the Alaska Supreme Court upheld this plan because it is one under which all Alaskans may benefit, now and long into the future. All share the same rights and all, in the end, benefit equally. The particular method of dis-

tributing permanent fund income selected by the Alaska legislature may not entirely solve the problems that we have discussed here. But the method of distribution is "fairly and substantially" linked to a solution of those problems. That is all that the Constitution requires.

III

CONCLUSION

The permanent fund dividend distribution plan itself is novel, but the legal issues raised by the plan have been resolved previously by this Court in a host of different contexts. Plenary consideration of this case would involve nothing more than the application of doctrines long established by this Court—doctrines that were thoughtfully and properly applied by the Alaska Supreme Court.

The State of Alaska respectfully urges this Court to dismiss this appeal for lack of a substantial federal question or, alternatively, to affirm summarily the decision of the Alaska Supreme Court.

Respectfully submitted,

WILSON L. CONDON
Attorney General
SUSAN A. BURKE
COUNSEL OF RECORD
Assistant Attorney General
AVRUM M. GROSS
Special Counsel to the Attorney General
State of Alaska
Department of Law
Pouch K, State Capitol
Juneau, Alaska 99811
(907) 465-3600
Counsel for Appellees

Office-Supreme Court, U.S.
FILED
APR 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1146

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RONALD M. ZOBEL and PATRICIA L. ZOBEL,

Appellants,

v.

THOMAS WILLIAMS, Commissioner of Revenue, and STATE OF ALASKA,

Appellees.

ON APPEAL FROM THE SUPREME COURT FOR THE STATE OF ALASKA

BRIEF OF APPELLANTS

MARK A. SANDBERG
CAMAROT, SANDBERG & HUNTER
310 "K" Street, Suite 408
Anchorage, Alaska 99501
Counsel for Appellants.

JONATHON B. CHASE
UNIVERSITY OF COLORADO
School of Law
Boulder, Colorado 80309

RONALD M. ZOBEL
PATRICIA L. ZOBEL
On The Brief

April, 1981

Anchorage, Alaska • Ken Wray's Print Shop, Inc. • (907) 276-4535

THE CONSTITUTIONAL QUESTIONS PRESENTED

1. May a State, for any purpose, impose a cumulative open-ended durational residency requirement so that new residents never achieve equal treatment with other residents who arrived earlier?

2. May a State impose an unlimited and perpetual durational residency requirement in conferring economic advantage or benefits?

3. May a State distribute shares in its oil, gas and mineral revenues, including Federal lease and bonus revenues, based upon the recipient's duration of residency viewed retrospectively to Statehood?

4. Can compliance with the demands of the Fourteenth Amendment be determined by forecasting a lifetime of potential effects which, if they actually do occur, might tend to minimize a present disparity of treatment?

5. Is there a violation of State citizenship, as secured by the Fourteenth Amendment, where a durational residency classification is used not as a test of the *bona fides* of a claim of State citizenship but rather as a device to perpetually deny equal treatment to new residents?

TABLE OF CONTENTS

Page

THE CONSTITUTIONAL QUESTIONS PRESENTED ..... *i*
OPINIONS BELOW 1
JURISDICTION OF THIS COURT 2
CONSTITUTIONAL PROVISIONS AND STATUTES 2
STATEMENT OF CASE 3
SUMMARY OF THE ARGUMENT 4
I. THIS STATUTE REPRESENTS THE MOST EXTREME DURATIONAL RESIDENCY REQUIREMENT EVER BROUGHT BEFORE THIS COURT 5
II. AN UNLIMITED DURATIONAL RESIDENCY REQUIREMENT WHICH CREATES A PERPETUAL INEQUALITY IN THE RECEIPT OF A SUPPLEMENT TO PERSONAL INCOME FROM PUBLIC RESOURCES MUST BE SUBJECTED TO STRICT SCRUTINY 14
III. THE ASSERTED PURPOSES OF THE ALASKA PERMANENT FUND DISTRIBUTION ACT'S DURATIONAL RESIDENCY CLASSIFICATION ARE NOT PERMISSIBLE, NOT COMPELLING NOR ARE THEY EVEN RATIONALLY RELATED TO IT 33
IV. SOSNA SETS OUT AN ALTERNATE MODEL UNDER WHICH THIS STATUTE SHOULD ALSO BE DEEMED UNCONSTITUTIONAL 43
CONCLUSION 48
APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Afroyim v. Rusk, 387 U.S. 253 (1967) 32
Baldwin v. Fish & Game Commission, 436 U.S. 371 (1978) 42
Barnes v. Board of Trustees, 369 F.Supp. 1327 (W.D.Mich. 1973) (three-judge court) 16, 23, 33, 34
Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833) 28
Baxter v. Birkins, 311 F.Supp. 222 (D. Colo. 1970) (three-judge court) 23
Blake v. McClung, 172 U.S. 239 (1898) 29

Brown v. Anderson, 202 F.Supp. 96 (D. Alaska 1962) (three-judge court) 21
Califano v. Aznavorian, 439 U.S. 170 (1978) 15
Califano v. Torres, 435 U.S. 1 (1978) 15
Carrington v. Rash, 380 U.S. 89, 96 (1965) 22
Chimento v. Stark, 353 F.Supp. 1211 (D.N.H.) aff'd 414 U.S. 802 (1973) 11, 13, 30
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 15, 38
Cole v. Housing Authority of the City of Newport, 435 F.2d 807 (1st Cir. 1970) 15, 22, 23, 37, 42
Craig v. Boren, 429 U.S. 190 (1976) 44
Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) 14, 15
Dandridge v. Williams, 397 U.S. 471 (1970) 25
Dean Milk Co. v. Madison, 340 U.S. 349 (1951) 40
Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) 43
Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) 28
Dunn v. Blumstein, 405 U.S. 330 (1972) 9, 13, 14, 15, 17, 20, 26, 32, 33
Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979) 44
Edwards v. California, 314 U.S. 160 (1941) 14, 22, 40
Frederick L. v. Thomas, 408 F.Supp. 832 (E.D.Pa. 1976) 46
Gaddis v. Wyman, 304 F.Supp. 717 (S.D.N.Y. 1969) (three-judge court), aff'd mem. sub nom. *Wyman v. Bowens*, 397 U.S. 49 (1970) 12, 39
Gilbert v. State, 526 P.2d 1131 (Alaska 1974) 20
Graham v. Richardson, 403 U.S. 365 (1971) 15, 18
Harris v. McRae, 100 S.Ct. 2671 (1980) 44
Hicklin v. Orbeck, 565 P.2d 159 (Alaska 1977) rev'd 437 U.S. 518 (1978) 21
Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892) 27
In Re Griffiths, 413 U.S. 717 (1973) 18, 38
Kent v. Dulles, 357 U.S. 116 (1958) 44
King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2nd Cir.) cert. denied, 404 U.S. 863 (1971) 23
Knauer v. United States, 328 U.S. 654 (1946) 32

Lindsey v. Normet, 405 U.S. 56 (1972) 25
Lucas v. Secretary, Department of Health, Education & Welfare, 390 F.Supp. 1310 (D.R.I. 1975) 46
Luria v. United States, 231 U.S. 9 (1913) 30
Lynden Transport, Inc. v. State, 532 P.2d 700 (Alaska 1975) 21
McGowan v. Maryland, 366 U.S. 420 (1961) 33
McLaughlin v. Florida, 379 U.S. 184 (1964) 33
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 9, 12, 14, 15, 16, 17, 21, 23, 25, 26, 32, 37, 42
Milliken v. Meyer, 311 U.S. 457 (1940) 29
Moore v. State, 553 P.2d 8 (Alaska 1976) 28
Mullaney v. Anderson, 342 U.S. 415 (1952) 21
NAACP v. Button, 371 U.S. 415 (1963) 33
Nyquist v. Mauclet, 432 U.S. 1 (1977) 9, 15, 18
Oregon v. Mitchell, 400 U.S. 112 (1970) 14, 29
Oyama v. California, 332 U.S. 633 (1948) 18
Passenger Cases, 48 U.S. (7 How.) 300 (1849) 14
Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) 14
Pease v. Hansen, 404 U.S. 70, rev'g mem. 157 Mont. 99, 483 P.2d 720 (1971) 12
Reed v. Reed, 404 U.S. 71 (1971) 33, 38
Rivera v. Dunn, 329 F.Supp. 554 (D.Conn. 1971) (three-judge court), aff'd mem., 404 U.S. 1054 (1972) 12, 42
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) 19
Shapiro v. Thompson, 394 U.S. 618 (1969) 9, 10, 12, 13, 14, 15, 16, 17, 21, 23, 25, 26, 28, 32, 33, 35, 36, 39, 40, 42, 46
Sheard v. Department of Social Welfare, 310 F.Supp. 544 (N.D. Iowa 1969) (three-judge court) 23
Sheldon v. Tucker, 364 U.S. 479 (1960) 33
Sherbert v. Verner, 374 U.S. 398 (1963) 15, 33
Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) 14, 28
Sosna v. Iowa, 419 U.S. 393 (1975) 12, 13, 17, 43, 44, 45, 46
Speiser v. Randall, 357 U.S. 513 (1958) 15
Starns v. Malkerson, 326 F.Supp. 234 (D.Minn. 1970) aff'd, 401 U.S. 985 (1971) 13, 17, 36
State v. Wylie, 516 P.2d 142 (Alaska 1973) 21
Strong v. Collatos, 593 F.2d 420 (1st Cir. 1979) 16, 23

Suffling v. Bondurant, 339 F.Supp. 257 (D.N.M.) (three-judge court), aff'd mem. sub nom. *Rose v. Bondurant*, 409 U.S. 1020 (1972) 13
Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948) 18
Thomas v. Baily, 595 P.2d 1 (Alaska 1979) 21, 27
United States v. Carolene Products Co., 304 U.S. 144 (1938) 19
United States v. Guest, 383 U.S. 745 (1966) 14
United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 33, 38
Vlandis v. Kline, 412 U.S. 441 (1973) 13, 17, 21, 22, 36
Webster v. Wofford, 321 F.Supp. 1259 (N.D. Ga. 1970) (three-judge court) 13
Williams v. North Carolina, 325 U.S. 226 (1945) 17
Williams v. Zobel, 619 P.2d 422 (Alaska 1980) 1, 8, 21, 36
Williams v. Zobel, 619 P.2d 448 (Alaska 1980) 1, 3, 10, 22, 26, 37, 38, 41, 46
Wyman v. Bowens, 397 U.S. 49 (1970) 13, 39, 40

Constitutional Provisions:

Alaska Constitution, Article 2, §2 20
Alaska Constitution, Article 9, §15 27
U.S. Constitution, Amendment 14, §1 ..... 2, 3, 4, 28

Statutes:

Alaska Stat. §16.10.310 21
Alaska Stat. §26.15.130 21
Alaska Stat. §38.05.058 ..... 21, 27
Alaska Stat. §43.23.010-.100 ..... 2, 3, 34
Alaska Stat. §47.05.010 21
Alaska Stat. §47.25.020-.035 ..... 21, 25
Alaska Stat. §47.45.010 25
Alaska Stat. §47.25.035 ..... 21, 26
Chap. 21, Laws of Alaska, 1980 ..... 24, 35, 41
28 U.S.C. §1257(2) 2

Treatises, Books, Law Reviews and Other Authorities:

E. K. Bauer, Commentaries on the Constitution 1790-1860 (1965) 30
P. Berton, The Klondike Fever (1958) 8

N. Dorsen, P. Bender, B. Neuborne, & S. Law, Emerson, Haber and Dorsen's Political and Civil Rights In The United States (4th Ed. 1979) 16

Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection*, 86 Harv. L.Rev. 1 (1972) 47

McCoy, *Recent Equal Protection Decisions — Fundamental Right To Travel or "Newcomers" As A Suspect Class?*, 28 Vand. L.Rev. 987 (1975) 19, 20, 46

G. Orwell, Animal Farm (1946) 11

J. Rousseau, Social Contract and Discourses (1950) 31

Sax, *The Public Trust Doctrine in Natural Resources Law; Effective Judicial Intervention*, 68 Mich. L.Rev. 471 (1970) 27

L. Tribe, American Constitutional Law (1978) 47

K. Wheeler, The Alaskans (1977) 8

Classics of International Law (J. B. Scott ed.) (1934) 31

Note, *Durational Residence Requirements From Shapiro Through Sosna: The Right To Travel Takes A New Turn*, 50 N.Y.U.L.Rev. 622 (1975) 17

Source of Democracy (S. Padover Ed. 1973) 30, 31

No. 80-1146

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RONALD M. ZOBEL and PATRICIA L. ZOBEL,

Appellants,

v.

THOMAS WILLIAMS, Commissioner of Revenue, and STATE OF ALASKA,

Appellees.

ON APPEAL FROM THE SUPREME COURT FOR THE STATE OF ALASKA

BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion of the Superior Court is not published. The Alaska Supreme Court has written two opinions in this case. The first of these, concerning a legislative scheme to exempt long-term taxpayers from the personal income tax is reported as *Williams v. Zobel,* 619 P.2d 422 (Alaska 1980). The second opinion, which concerned the statute at issue here, is reported as *Williams v. Zobel,* 619 P.2d 448 (Alaska 1980).

JURISDICTION OF THIS COURT

This is an appeal from a decision of the Alaska Supreme Court declaring a statute which distributes money earned by Alaska's Permanent Fund solely on the basis of durational residency to be constitutional. This statute was challenged by the appellants on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. This challenge was rejected by the Alaska Supreme Court in a judgment issued on October 24, 1980. Appellants filed a Notice of Appeal to this Court in the Alaska Supreme Court on October 28, 1980. The appeal was docketed on January 9, 1981.

This Court has jurisdiction under 28 U.S.C. §1257(2) to hear this appeal.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Alaska Permanent Fund was established by Article IX, Section 15 of the Alaska Constitution. A copy of that constitutional provision is in the Appendix to this Brief. The Permanent Fund Dividend distribution statute which is the subject of this appeal appears at Alaska Stat. §43.23.010 et seq. A copy of those statutory provisions is also included in the Appendix to this Brief.

The appellants contend that the distribution statute offends Section I of the Fourteenth Amendment of the United States Constitution which states the following:

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

The tremendous oil and mineral wealth bestowed upon Alaska has created a situation which the Alaska Supreme Court has labelled "unique." Faced with surplus revenues far in excess of amounts needed for ordinary governmental functions, the State established a Permanent Fund in 1976. At least twenty-five percent of all mineral lease revenues, royalties, royalty sale proceeds and federal mineral revenue sharing payments and bonuses are placed into the fund. The provisions establishing the fund appear in the Appendix.

By a statute passed on April 15, 1980, Alaska Stat. §43.23.010, et seq., the State has proposed to give away one-half of the earnings of that fund to its citizenry. The amount which any Alaska resident receives will be solely and directly tied to the duration of his or her residency. No criterion other than duration of residency is utilized in assessing the size of the distribution which each resident will receive. The statute has retrospective effect back to the year 1959. The relevant statutory provisions appear in the Appendix.

The Alaska Department of Revenue estimates that distributions from the Fund during the year 1980 will total one hundred and thirty million dollars ($130,000,000.00). A similar amount is projected to be distributed to the citizenry, based on duration of their residency, in 1981. The Department of Revenue has estimated that the yearly gross distribution by the year 1986 will approach one-half of one billion dollars. 619 P.2d at 467, n.4.

Appellants, residents of the State of Alaska since 1978 (R. 1, 20), filed suit in the Superior Court for the Third Judicial District of the State of Alaska seeking, among other things, a declaration that distribution of State assets to the citizenry based solely on the duration of their residency violated the Fourteenth Amendment of the United States Constitution. The Superior Court Judge agreed that the plan was unconstitutional and entered judgment on June 30, 1980 in favor of the Appellants (R. 315). No distributions pursuant to the

plan had taken place at that time and any prospective distributions were enjoined.

An appeal to the Supreme Court of the State of Alaska followed. On October 24, 1980, the Alaska Supreme Court issued an opinion declaring that the judgment of the lower Court was reversed. The Court split three to two on the question.

SUMMARY OF THE ARGUMENT

This is the most radical durational residency requirement ever brought before this Court. It is qualitatively unlike almost all other durational residency requirements in that it does not purport to be a test for State citizenship. Indeed, it is not a test for anything.

It is also quantitatively the most extreme durational residency requirement which this Court has ever seen. The length of residency required to obtain the maximum benefit under this program is limited only by the human life span. Appellants will never attain the maximum benefit so long as there is someone alive who arrived in Alaska before them. Each year this statute creates a new class of persons who have less rights than all who have come before them.

Perpetually determining an individual's rights based upon when he arrived in the State is a penalty upon the right of interstate migration. Such a harsh classification should be deemed to be a penalty *per se*. Newcomers, as a class, share many of the characteristics of other classifications which this Court has labelled suspect. The fact that this statute is clearly directed against them should be enough to trigger strict scrutiny. Additionally, the statute impacts upon important individual interests and federalism concerns in such a fashion as to make penalty analysis appropriate.

Equal protection forbids an effort to apportion services or benefits between new and old residents. One reason that such apportionment is forbidden is that the first sentence of the Fourteenth Amendment contains a substantive guarantee of the right to enter a State and, upon a *bona fide* residence, enjoy

the same rights as other citizens. State citizenship is granted by the Federal Constitution, not by the State of Alaska. The only legitimate purpose for a durational residency requirement is as a test of *bona fide* residence.

None of the purposes which the State of Alaska advances in defense of this statute are compelling. Indeed, they are not fairly and substantially related to any important State interest nor are they even rationally connected to one. This statute is neatly tailored to do only one thing, to reward long-term residents. That is an impermissible purpose.

I. THIS STATUTE REPRESENTS THE MOST EXTREME DURATIONAL RESIDENCY REQUIREMENT EVER BROUGHT BEFORE THIS COURT

A. THE LEGISLATIVE HISTORY DEMONSTRATES AN INTENT TO DISCRIMINATE AGAINST NEW RESIDENTS

The Eleventh Alaska Legislature was faced with huge revenue surpluses and public demands that some of that wealth be returned to the citizenry through tax repeal and cash rebates. Part of its response to these demands was the statute before this Court. The plan being scrutinized here is designed to annually distribute a portion of those surplus revenues to adult residents based solely on the duration of their residency.

The bill which eventually became the Alaska Permanent Fund Distribution Act, Senate Bill 122, originated in the Alaska State Senate as a bill which would reduce taxes, provide for tax refunds, and distribute the earnings in the permanent fund. This bill provided for tax relief and tax rebates through a complicated formula based on how many years a person had filed an Alaska personal income tax form. This formula was supported because it would benefit "people who

have lived in Alaska for a long time." (Remarks of Senator Ray,[1] R. 173.) The bill was passed and was sent to the House.(R. 175.)

When the bill reached the floor of the House, it had been amended to provide for a four-year suspension of the Alaska personal income tax and payments to State residents from earnings of the permanent fund. Under the bill all Alaska residents who had resided in Alaska for one year would receive an equal payment. The Chairman of the Rules Committee reported that the Attorney General said that a durational residency classification running back to Statehood would be constitutional but that "our own legal division suggests that probably one year is all that we can require as far as residency, and still fall inside the guidelines of the Constitution." (Remarks of Rep. Cotten, R. 181-82.) The bill passed the House and was eventually sent to a Free Conference Committee[2] made up of three members from each house.

The Free Conference Committee re-wrote Senate Bill 122 to provide for a residency based distribution of earnings from the Permanent Fund going back to Statehood, completely amended another bill (S.B. 394) to provide for tax exemptions for those who had filed Alaska net income tax returns for three years, and sent both bills to the floor of each house as a legislative package.[3] In this way the residency based tax and cash rebate scheme of the Senate (S.B. 122) was carried into the two systems established by the House.

The Senate passed both bills without debate (R. 197-203). In the House debate erupted over the constitutionality and fairness of discriminating against newcomers to the State. Representative Randolph said:

---

[1]Senator Ray was on the Free Conference Committee that eventually wrote the statute before the Court.

[2]In the Alaska Legislature a Free Conference Committee can completely re-write a bill and send it to the floor of each house.

[3]The bills were debated together and referred to as being "tied together" (Remarks of Rep. Randolph, R. 208), whereas before "two bills were one bill." (Remarks of Rep. Smith, R. 212).

However, there is one area that really does disturb me, and it could be the Achilles' heel of this whole—of this whole issue, and I want to be clearly on record as being concerned about it. And it addresses the way we deal with newcomers, newcomers to the Alaska work market, whether they be Outsiders, or so-called Outsiders, or our own children as they grow up and come into the work market. . . . And I think it's really arbitrary to try to decide who a newcomer is, and what they ought to get or what they ought to be entitled to. You know, some people may consider a newcomer a two-year resident or a four-year resident, on the other hand a person who's lived here 50 or 60 years may very well consider anybody who's been here 10 years or 15 years as newcomers.

I also think it's worth making the point that a person who has been here for 50 or 60 years, and unfortunately been a ward of the State all of that time, I have some questions as to whether they have more coming from our surplus distribution than maybe a person who's been here a couple of years, and through the use of their time, their talent, their skills and their capital contributed significantly to the betterment of all of us. . . . So I get a little bit tired of—and I've got a hunch an awful lot of people who have been here five or six or seven or ten years, whatever we knock off as newcomers, get a little bit tired of being chastised and penalized and discriminated against for having not been born here or not have been here 30 or 40 or 50 years. . . . I understand the politics of talking to the oldtimers and talking to the long-time Alaskans, but I just think that we're taking an unnecessary risk, and that if this comes back to haunt us, I think many of us on this body will wish that that provision was not in the bill. I think we ought to treat new—I think we ought to treat everybody equally as individuals and I do have that objection to the bills.

(R. 207-10)

Representative Brown, noting that a majority in the House received the maximum payment under the bill (R. 210-11), said the residency based payment was an excellent response to "constituent pressure" (R. 214) and defended the constitutionality and fairness of the bill on the ground that it was good

public policy to compensate for living in a cold climate and high cost economy (R. 220-21). Representative Brown also analogized the dividend distribution to the distribution of stock in an oil company (R. 222).

The Co-Chairman of the Free Conference Committee, Representative McKinnon, reported on the choice of 1959 as the basis for the retrospective award of dividends:

> The reason—the inability to pick a shorter time period is simply due to the fact there's no logical reason to pick a date other than 1959. If you're distributing the natural resources wealth of the State, we're faced with the question of either no—equal payments to everybody who's been here for 30 days, or tying it to the 1959, and the Committee did decide to go with the '59 date.

(R. 223-24)

The debate on the legislative package contained references to "boomers and cheechakos"[4] (remarks of Rep. Hayes, R. 234), and "Texans and Okies and different people from the Lower 48" (remarks of Rep. Hurlbert, R. 210). This legislative history demonstrates that the overriding legislative purpose for the tax exemption and permanent fund distribution system was to establish financial policies that would insulate long-time Alaskans from sharing the fruits of Alaska's development. The Alaska Supreme Court struck down the tax exemption portion of the legislative package in *Williams v. Zobel*, 619 P.2d 422 (1980) (per Dimond, J.).

B. IN ACTUAL OPERATION, THIS STATUTE AMOUNTS TO AN OPEN ENDED AND PERPETUAL DURATIONAL RESIDENCY REQUIREMENT

Any meaningful discussion of the constitutionality of this statute must begin with an examination of its operation and effect. In actuality, this statute operates as an unlimited and perpetual durational residency requirement.

---

[4]The word "Cheechako" is an uncomplimentary Alaskan colloquialism for "newcomer." K. Wheeler, THE ALASKAN, 73, 175 (1977), P. Berton, THE KLONDIKE FEVER, 195 (1958).

The durational residency requirement in this statute is unprecedented in American law because of its extreme terms. It is absolute, permanent and cumulative. It is absolute in that the benefit denied one year will not be provided in the next year or at any time in the future. It is permanent in that the Alaska citizen denied a benefit because of durational residency is always denied the maximum benefit received by other Alaska citizens. The new resident never attains equality with the person who came here before him. It is cumulative in that the durational residency requirement lengthens with every year and theoretically extends into infinity. Each year this statute creates a new class of Alaska citizens who have less rights than other Alaska citizens in the revenue from the disposal of Alaska resources belonging to all Alaskans. Durational residency analysis is unquestionably appropriate.

The State has previously argued that durational residency analysis is not appropriate since the permanent fund distribution plan does not absolutely cut off new residents from any benefit. Rather, the State suggests, this case is not like ordinary residency cases because the new resident here does receive a fractional benefit.

This assertion is simply not correct. If it were, the discrimination in *Dunn v. Blumstein*, 405 U.S. 330 (1972) could have been cured by giving new residents a fractional vote. The discrimination in *Shapiro v. Thompson*, 394 U.S. 618 (1969) could have been cured by giving new residents a little welfare and the discrimination in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) could have been cured by giving new residents a little free medical care but not as much as long-term residents received. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class. *Nyquist v. Mauclet*, 432 U.S. 1, 9 (1977).

Durational residency requirements are not invalidated simply because the Court does not like durational residency requirements. They are invalidated because they either place burdens upon or deny benefits to those persons who have most recently exercised their fundamental right of interstate

migration and because they pose a threat to the unity of the federal union. While the permanent fund distribution scheme is a little different than the ordinary durational residency classification, it suffers from exactly those same problems. New residents are being denied a benefit which the State is providing to other persons for no reason other than the duration of their residency. While it is quite clear that there is no fundamental right to receive a benefit from the State to which one migrates, there is a constitutionally protected right not to be singled out for discriminatory treatment solely because one has recently exercised a constitutional right.

In an effort to escape close judicial scrutiny, the State has argued that the appellants will somehow catch up in later years and thus, by projecting a lifetime of potential effects which, if they actually occur, might tend to minimize a present disparity of treatment, the State and the majority below conclude that a new resident cannot be properly characterized as being consistently denied parity with long-term residents. This assertion has numerous conceptual defects.

First of all, it ignores reality. If Mr. Zobel is compared to someone of his own age who was born in the State, it is quite obvious that Mr. Zobel will never catch up with that otherwise similarly situated individual. There will never be a year in which their distributions will be identical. In order for Mr. Zobel to catch up, we have to hypothesize that this other individual either dies or moves away. In that event, the two individuals are, by hypothesis, no longer similarly situated and there is no reason to expect them to receive equal funds.

As the dissent below noted, 619 P.2d at 467, this argument is no different than asserting that a new resident who is not eligible for welfare because he does not meet a one year residency requirement is not treated differently from a long-term resident who receives welfare because the former may remain in the State longer than the latter. Such an argument, of course, has been rejected in *Shapiro* and deserves no better treatment here.

A more fundamental problem with the State's analysis is that it stands equal protection theory on its head. The State

comes here to argue for the concept of "equality in the aggregate."[5] Under this incredible Orwellian concept, equal protection becomes a goal that one works his way toward. This court is asked to take a broad view of a lifetime of effects on innumerable individuals into the distant, indeed theoretically infinite, future. The concept might as well be labelled equality by increment or equality by attrition.

No one should be required to wait a lifetime for equal protection under the law. Compliance with the demands of the Fourteenth Amendment must be judged on how a program operates in the present and not what its effects might be in the infinite future. Equality in the aggregate is, by definition, inequality in the present. There can only be equality and inequality. Despite the State's rhetoric, which could have been lifted straight from the pages of ANIMAL FARM,[6] some residents cannot be "more equal" than others.

Unlike every durational residency case which this Court has ever seen, at least outside of the governmental offices category,[7] this statute is not designed as a test of the bona fides of a claim of State citizenship. Indeed, it is not a test of anything. Rather, it simply represents a State created caste system aimed solely at insuring that those persons who have most recently exercised their fundamental right of interstate migration are, as a class, perpetually accorded an inferior position.

The plan before the Court would truly revolutionize the relationship between a State and its citizenry. If it is constitutionally permissible to distribute the fruits of economic development of a State's public resources on the basis of length of residency, then the idea of equal citizenship has been

---

[5]Motion of Thomas Williams, Commissioner of Revenue, and State of Alaska To Dismiss or Affirm at 10.

[6]G. Orwell, ANIMAL FARM (1946)

[7]This Court has summarily affirmed without opinion the requirement that a person must be a citizen of New Hampshire for seven years for eligibility to run for governor. *Chimento v. Stark*, 353 F.Supp. 1211 (D.N.H.) *aff'd* 414 U.S. 802 (1973).

lost. A State could as easily issue fishing licenses which entitled the bearer to take one fish for every year that he had lived in the State, ration the use of the public lands based on durational residency or reserve the finest schools for the children of long-term residents.

The statute challenged in this case creates a permanent program for the annual distribution of earnings from Alaska's oil and mineral wealth. The durational residency requirement is not a "waiting period" for equal treatment in the *Shapiro* and *Sosna* sense at all. A new migrant will never catch up with someone who came before him. As the program enters 1981, the Zobels have waited one year, but that has not put them one year closer to equality with other citizens of Alaska receiving the maximum benefits. The "waiting period" in this statute is forever.

C. THIS COURT HAS NEVER APPROVED A DURATIONAL RESIDENCY REQUIREMENT OF SUCH LENGTH

This Court has never before approved a durational residency requirement of such length; nor has it ever approved either a cumulative or an unlimited durational residency requirement. This statute is both. By the year 2000, Alaskans will be divided into forty-one classes of citizens based upon the date that they moved to or were born in Alaska. The terms of the durational residency requirement imposed by the statute are unprecedented in American law. This statute imposes a more extreme durational residency requirement than any case which has ever come to this Court.

Within the context of governmental distribution programs, this Court has struck down every residency requirement imposed by the States which has come before it. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Rivera v. Dunn*, 329 F.Supp. 554 (D.Conn. 1971) (three-judge court), *aff'd mem.*, 404 U.S. 1054 (1972); *Pease v. Hansen*, 404 U.S. 70, *rev'g mem.* 157 Mont. 99, 483 P.2d 720 (1971); *Gaddis v. Wyman*, 304 F.Supp. 717 (S.D.N.Y. 1969) (three-judge court),

aff'd mem. sub. nom. Wyman v. Bowens, 397 U.S. 49 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

With the exception of the governmental office category, this Court has never approved a durational residency requirement in excess of one year. *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn. 1970) *aff'd*, 401 U.S. 985 (1971) (one year for reduced state university tuition); *Suffling v. Bondurant*, 339 F.Supp. 257 (D.N.M.) (three-judge court), *aff'd mem. sub nom. Rose v. Bondurant*, 409 U.S. 1020 (1972) (six-month residency for admission to the State Bar);[8] *Sosna v. Iowa*, 419 U.S. 393 (1975) (one year residency for divorce).

The longest durational residency requirements which have been approved by this Court have been within the governmental office category. This Court summarily affirmed without opinion the requirement that a person must be a citizen of New Hampshire for seven years for eligibility to run for governor. *Chimento v. Stark*, 353 F.Supp. 1211 (D.N.H.), *aff'd* 414 U.S. 802 (1973). But even in this area the durational residency requirements have been finite and limited in their scope, unlike the residency requirement at issue in this case.

In those cases where this Court has rendered a decision establishing that durational residency requirements are constitutionally permissible, they have been either as indicia that one is a bona fide resident, *Vlandis v. Kline*, 412 U.S. 441, 452-53 (1973), or to protect a State in the exercise of its domestic relations jurisdiction. *Sosna v. Iowa*, 419 U.S. 393, 406-09 (1975). It has never before been questioned that durational residency requirements must be reasonable in length and that, once the minimum or threshold requirement has been satisfied, all citizens must be treated equally. Durational residency requirements, when permissible, must be in the nature of a reasonable, finite threshold requirement. *Vlandis v. Kline*, 412 U.S. at 452; *Dunn v. Blumstein*, 405 U.S. 330,

[8] *Compare Webster v. Wofford*, 321 F.Supp. 1259 (N.D. Ga. 1970) (three-judge court) (one year residency requirements for admission to the State Bar struck down), *with Suffling v. Bondurant*, 339 F.Supp. 257 (D.N.M.) (three-judge court), *aff'd mem. sub nom. Rose v. Bondurant*, 409 U.S. 1020 (1972) (six-month residency requirement for admission to the Bar approved).

363 (1972) (Burger, C. J., dissenting) (approving reasonable periods); *Shapiro v. Thompson*, 394 U.S. 618, 644, 646, 648 (1969) (Warren, C. J., dissenting) (approving minimal residency requirements); 394 U.S. at 677 (Harlan, J., dissenting) (approving residency requirements that are not excessive).

II. AN UNLIMITED DURATIONAL RESIDENCY REQUIREMENT WHICH CREATES A PERPETUAL INEQUALITY IN THE RECEIPT OF A SUPPLEMENT TO PERSONAL INCOME FROM PUBLIC RESOURCES MUST BE SUBJECTED TO STRICT SCRUTINY

A. THE STATUTE IS A PENALTY ON THE RIGHT OF INTERSTATE MIGRATION

For more than a century, this Court has recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to protect a person in his right to travel, migrate, resettle, find a new job and start a new life without suffering legal disabilities. *Passenger Cases*, 48 U.S. (7 How.) 300, 518 (1849); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43-44 (1868); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Edwards v. California*, 314 U.S. 160 (1941); *United States v. Guest*, 383 U.S. 745, 757-59 (1966); *Shapiro v. Thompson*, 394 U.S. 618, 629-31, 634 (1969); *Oregon v. Mitchell*, 400 U.S. 112, 238-39 (separate opinion of Brennan, White, and Marshall, J.), 285-86 (opinion of Stewart, J., concurring and dissenting, with whom Burger, C. J., and Blackmun, J., joined) (1970); *Dunn v. Blumstein*, 405 U.S. 330, 338-39 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254-55 (1974).

In 1873, Justice Miller said that "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1873) *Accord, Oregon v. Mitchell*, 400 U.S. at 285-86 (opinion of Stewart, J. concurring and dissenting, with whom Burger, C. J. and Blackmun, J., joined).

In *Shapiro v. Thompson*, the Court recognized that durational residency classifications distinguished between the citizens of a State on the basis of recent migration and that conditioning the receipt of governmental rights and benefits upon whether a person has exercised a fundamental right penalizes that right. *See Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958). If a State is to be allowed to classify on the basis of the "virtually unconditional personal right" to interstate migration,[9] the State has the burden of demonstrating that the classification is necessary to promote a compelling governmental interest. *Memorial Hospital v. Maricopa County*, 415 U.S. at 262; *Dunn v. Blumstein*, 405 U.S. at 339; *Shapiro v. Thompson*, 394 U.S. at 634. *See also Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977).

The ultimate parameters of *Shapiro's* penalty analysis have never been fully articulated. One court has defined a penalty as a disadvantage, loss or hardship due to some action. *Cole v. Housing Authority of the City of Newport*, 435 F.2d 807, 811 (1st Cir. 1970). This Court has found unconstitutional penalties in the levying of a one dollar tax on interstate travel, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868) or in the denial of unemployment compensation to a person who would not work on Saturday because of her religion. *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 648 (1974) the Court held that a mandatory maternity leave policy "unduly penalize[d] a female teacher for deciding to bear a child."

The fact that the program before the Court in this case is a novel one is of no importance in deciding whether the extreme durational residency requirement it contains amounts to a penalty on interstate migration. Even though citizens who have migrated to Alaska since 1959 will get a benefit not received in other States, this is not relevant in determining whether the classification is a penalty upon the exercise of the

---

[9] *Shapiro v. Thompson*, 394 U.S. at 643 (Stewart, J., concurring); *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978) (dicta); *Califano v. Torres*, 435 U.S. 1, 4 n. 6 (1978) (per curiam) (dicta).

right to migrate. *Strong v. Collatos*, 593 F.2d 420, 422 (1st Cir. 1979); *Barnes v. Board of Trustees*, 369 F.Supp. 1327, 1337 (W.D.Mich. 1973) (three-judge court).

> [T]he determination of whether a limited benefit program "penalizes" the exercise of a constitutional right is to be made by comparing the limited program, not with the constitutionally tolerable absence of any program, but with a program that does not contain the challenged exceptions. The focus is on the *exceptions* to the benefit program rather than on any penalizing effect of the limited program as a whole. Such exceptions may not be triggered by the exercise of a constitutional right unless the State has a compelling interest for making the exceptions.

N. Dorsen, P. Bender, B. Neuborne and S. Law, EMERSON HABER AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, Vol. II at 271 (4th ed. 1979) (emphasis in original)

Shapiro cautioned that some "waiting period[s]. . . may not be penalties upon the exercise of the constitutional right of interstate travel." 394 U.S. at 638 n. 21. *Memorial Hospital* stated that in determining the burden of justification a durational residency classification must meet, the Court will look to "the nature of the classification and the individual interests affected." 415 U.S. at 253.

This statute contains an unlimited and perpetual durational residency classification which denies an equal share in the monetary benefits derived from the sale of the State's publicly owned resources[10] to all residents who have not lived in the State since 1959. Such a permanent denial of such important benefits solely on the basis of the time of interstate migration is a penalty on the right to migrate of profound proportions.

1. The Nature Of The Classification

Shapiro referred to the durational residency requirement before it as a "waiting-period requirement." 394 U.S. at 626,

[10]A portion of federal mineral revenue sharing payments and bonuses received by Alaska are also deposited in the Permanent Fund.

627. The new migrant had to wait for a period of time (one year) and then was granted equal treatment with all other citizens in the State. The Court held that even this one year waiting period for equal treatment was a penalty on the right to interstate migration.

All of the previous durational residency cases reviewed by this Court have involved durational residency requirements of a finite and comparatively short duration. *Shapiro v. Thompson, supra, Dunn v. Blumstein, supra, Memorial Hospital v. Maricopa County, supra, Sosna v. Iowa*, 419 U.S. 393 (1975). These requirements are properly called "waiting periods." They are not automatically unconstitutional. Where proof of bona fide residency is difficult, they may be held not to penalize interstate migration. Thus the Court in *Vlandis v. Kline*, 412 U.S. 441, 452 (1973), noted that "special problems [are] involved in determining the bona fide residence of college students who come from out of State to attend [a] public university. . . " since those students are characteristically transient. *See Starns v. Malkerson*, 326 F.Supp 234 (D.Minn. 1970) *aff'd*, 401 U.S. 985 (1971). It is generally assumed that some waiting period may be imposed in these circumstances as a test of the *bona fides* of a claim of state residency.

Similarly, a petitioner for a divorce must be a domiciliary of a State before that State can constitutionally exercise jurisdiction over the divorce. *Williams v. North Carolina*, 325 U.S. 226 (1945). Such decrees are subject to collateral attack if there is any question of domicile and therefore this Court in *Sosna v. Iowa* found a one-year waiting period for filing for a divorce to be a permissible requirement that did not penalize a new migrant's right to travel. 419 U.S. at 406-407.[11]

The durational residency requirement used for the annual distribution of earnings from Alaska's oil and mineral wealth is not a "waiting period" for equal treatment in the *Shapiro* or *Sosna* sense at all. The classification before the Court is a

[11]For an excellent summary and analysis of the Court's previous cases on durational residency requirements see Note, *Durational Residence Requirements From Shapiro Through Sosna: The Right To Travel Takes A New Turn*, 50 N.Y. U. L. Rev. 622 (1975).

greater penalty on the exercise of the right to migrate than a waiting period because it relegates the new migrant to a permanent legal status of inferior quality solely because of the time of migration.

The historical function of this Court in providing protection against penalties on the fundamental right to migrate cannot be separated from protecting the persons who exercise that right once they arrive in their new State. The statute before the Court would transform the right to travel into a ticket to a permanent second-class status by creating a permanent underclass of residents who have migrated to Alaska since 1959. Permanent legal disabilities placed upon those persons must be held to be a penalty on the right to migrate.

Such a durational residency classification takes on some of the same attributes of an alienage or national origin classification. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971); *In re Griffiths*, 413 U.S. 717 (1973); *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Oyama v. California*, 332 U.S. 633 (1948). U. S. citizens from other States have a right to enter and "abide 'in any state' in the Union on an equality of legal privileges with all citizens under non-discriminatory laws." *Graham v. Richardson*, 403 U.S. at 374 (citing *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948). Alaska does not overtly fence out new residents but as those migrants cross the Alaskan border they receive a number that will determine their legal status under this program forever. The new migrant is powerless to change that status.

Justice Rehnquist in his dissent in *Nyquist v. Mauclet*, discussed the characteristics of an alienage classification which cause this Court to apply strict scrutiny:

> [A]liens residing in this country necessarily are subject to a period of time during which they *must* bear this *status* of an "alien." If a classification therefore places aliens in one category, and citizens in another, then, thereafter, every entering resident alien must pass through a period of time in the country during which he falls into the one category and not the other. *Nothing except time* can remove him from his identified status as an "alien" and

> from whatever associated disabilities the statute might place on one occupying that status. In this sense, it is possible to view aliens as a discrete and insular minority, since they are categorized by a factor beyond their control.
>
> The prior alienage cases from this Court, utilizing strict scrutiny to strike down state statutes, all dealt with statutes where the line drawn necessarily suffered that infirmity: in all of those cases, *the line drawn necessarily left incoming resident aliens afflicted with the disability for some period of time. Nothing except the passage of time could remove the alien from the classification and the disability.* The statutes, therefore, involved the precise infirmity which led this Court to accord aliens "suspect classification" treatment. The line drawn by the legislature was drawn on the basis of a *status, albeit temporary, that the included members were powerless to change.*

432 U.S. 18-19 (Rehnquist, J., dissenting) (emphasis added). A permanent durational residency classification is even more invidious than the ones discussed by Justice Rehnquist because not even the passage of time will remove the legal disability placed on new residents. In addition, a permanent durational residency classification raises fundamental questions about the unity of this country which are not suggested by an alienage classification.

The relationship between the protection of the fundamental right to travel and the protection of those persons who have exercised that right has caused some commentators to analyze the underlying policy of *Shapiro* and its progeny as the protection of new migrants from class legislation. *See, e.g.* McCoy, *Recent Equal Protection Decisions — Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 Vand. L.Rev. 987 (1975). New residents have been subjected to "a history of purposeful unequal treatment, [and] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)

> Certainly "newcomers" as a class are almost always a minority in the governmental unit, unable to protect their interests through the political process. The fact that one remains a member of the class only for a certain period of time, gradually acquiring the perspective and vested interests of the "old-timers", assures the continuance of both the minority status and the political impotence of the "newcomer" class.
>
> * * *
>
> Common experience indicates that something in the basic nature of man, some chauvinistic instinct, causes him to band together into groups of "insiders", which then cultivate a sense of security by fervently and irrationally discriminating against "outsiders". Newcomers are certainly among the most common victims of this discriminatory instinct. From the earliest loose associations of child playmates, through the social cliques of high school and the fraternities and sororities of college, to the political organizations on the local, state and national level, newcomers have traditionally suffered discrimination simply because they are newcomers. As with other psychological phenomena, varied and complex explanations are possible, but the tendency to discriminate against newcomers is verified by experiences in everyone's life. Such a minority would seem to be a particularly appropriate subject for the special protection afforded suspect classes like blacks and aliens.

McCoy, *Recent Equal Protection Decisions — Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 Vand. L. Rev. 987, 1018, 1019-20 (1975).

This statement is especially true in the State of Alaska where the legislature is dominated by long-time residents[12] and new residents are presently and historically have been subjected to a host of statutes which discriminate against

---

[12]Art. 2, §2 of the Alaska Constitution imposes a three-year durational residency requirement for candidacy for the legislature. This requirement was upheld in *Gilbert v. State*, 526 P.2d 1131 (Alaska 1974). During the debate on the Permanent Fund Distribution Act reference was made to the fact that a majority of the members of the House would get the maximum payment. (Remarks of Rep. Brown, R. 210-11).

them.[13] Whether the permanent durational residency requirement is analyzed as a penalty on the fundamental right to migrate or as class legislation directed at a discrete and insular minority that have exercised that right, it is a classic example of the kind of invidious discrimination the equal protection clause prohibits.

The principles of *Shapiro, Dunn* and *Memorial Hospital* apply with special force to a classification which permanently denies U. S. citizens who migrate to a State the treatment given other citizens of that State. Classifications which created permanent unequal treatment for some bona fide residents of a State have previously been declared invalid by this Court. *Vlandis v. Kline*, 412 U.S. 441 (1973) declared invalid a classification which prevented students who migrated

[13]Alaska Stat. §47.25.020 requires 15 continuous years of residency for special housing and other assistance for the destitute elderly. Alaska Stat. §47.25.035 imposes a 30 year residency requirement for the same benefits when residency has not been continuous for 15 years. Alaska Stat. §47.05.010 provides special assistance for the elderly who have resided in the State for 25 continuous years. Alaska Stat. §38.05.058 provides discounts on the purchase of State land up to 75 percent of the value of the land for each year of residency. Alaska Stat. §26.15.130 requires five years residency for veteran's housing loans. Alaska Stat. §16.10.310 requires five years residency for commercial fishing loans. The following cases have considered other efforts of the State of Alaska to exclude non-residents and new residents from the fruits of Alaska's development. *Mullaney v. Anderson*, 342 U.S. 415 (1952) ($5.00 fee on resident commercial fisherman and $50.00 fee on non-resident commercial fisherman violates Privileges and Immunities of the United States Constitution); *Brown v. Anderson*, 202 F.Supp. 96 (D.Alaska 1962) (three-judge Court) (Act authorizing closing of commercial fishing areas to non-residents violates both the Privileges and Immunities Clause and the Commerce Clause); *State v. Wylie*, 516 P.2d 142 (Alaska 1973) (one year durational residency requirement for State employment preference violates equal protection); *Lynden Transport, Inc. v. State*, 532 P.2d 700 (Alaska 1975) (discrimination against non-resident motor carriers violates equal protection); *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977) (one year durational residency requirement for employment on Alaska Pipeline violates equal protection, residency requirement upheld) *rev'd* 437 U.S. 518 (1978) (residency requirement for employment on Alaska Pipeline violates privileges and immunities); *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979) (State land disposal based on durational residency up to ten years unconstitutional on other grounds); *Williams v. Zobel*, 619 P.2d 422 (Alaska 1980) (taxing the income of only residents of three years duration or less violates equal protection).

into a State from ever being granted equal treatment for tuition purposes, even though they were unquestionably bona fide residents. In *Carrington v. Rash*, 380 U.S. 89, 96 (1965), a classification which prevented a soldier from ever obtaining an equal vote with other bona fide residents of Texas was declared invidious and in violation of the Fourteenth Amendment. At least the deprivations in *Vlandis* and *Carrington* could be avoided by changing one's status as a student or soldier for one year. New migrants to Alaska cannot escape the legal disability created by the statute before the Court.

A durational residency classification which operates in this fashion is not "cognizable under a Constitution which was written partly for the purpose of eradicating such provincialism." *Cole v. Housing Authority of the City of Newport*, 435 F.2d 807, 813 (1st Cir. 1970). *See also Edwards v. California*, 314 U.S. 160, 174 (1941). The constitutional minimum is that a new migrant to a State has to be treated equally at some point and that a perpetual distinction between citizens of a State on the basis of the time of migration is *per se* a penalty on interstate migration without reference to the right or benefit denied. However, in the case before the Court the individual benefits and rights denied are of significant importance.

2. Individual Interests Affected

Because of the huge surplus revenues in the Alaska treasury, the State legislature has decided to directly distribute a portion of the monetary benefits from the sale of the State's publicly owned resources directly to all of its citizens. The monetary benefits are a valuable supplement to each Alaskan's personal income because of the high cost of living in Alaska. The Alaska Department of Revenue has estimated that $479,000,000.00 will be distributed annually by 1986. *Williams v. Zobel*, 619 P.2d 467 n.4 (1980) (Dimond, J., dissenting).

Both this Court and the lower courts have consistently struck down durational residency requirements of even relatively short duration when States have imposed them as a qualification for public monetary and economic benefits of all

types. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (non-emergency medical care); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare); *Strong v. Collatos*, 593 F.2d 420 (1st Cir. 1979) (veterans benefits); *King v. New Rochelle Municipal Housing Authority*, 442 F.2d 646 (2nd Cir.) *cert. denied*, 404 U.S. 863 (1971) (housing); *Cole v. Housing Authority of The City of Newport*, 435 F.2d 807 (1st Cir. 1970) (housing); *Barnes v. Board of Trustees*, 369 F.Supp. 1327 (W.D.Mich. 1973) (three-judge court) (veterans assistance); *Baxter v. Birkins*, 311 F.Supp. 222 (D.Colo. 1970) (three-judge court) (ADC benefits); *Sheard v. Department of Social Welfare*, 310 F.Supp. 544 (N.D.Iowa 1969) (three-judge court) (old-age assistance).

The direct monetary benefits under this program can be used for any purpose including food, shelter, clothing, medical care or fuel. The fact that Alaska has placed the label "permanent fund dividends" upon its share-the-wealth program cannot obscure the social welfare purpose served by it. Whether this economic assistance is called welfare, dividends or gifts[14] matters little to the new resident who finds he endures the same high cost of living as his neighbor who has just received a thousand dollar check from the State. The social welfare purpose served by Alaska's permanent fund distribution program was recognized by the Alaska Legislature in section one of the act when it declared that:

> State residents have been paying increasingly high prices for fossil fuels, while few have received direct monetary benefits from the production and development of fossil fuels belonging to them as Alaskans. It is in the public interest to return to state residents a portion of the state's

[14]The term "gift" seemed most appropriate to at least one legislator. Representative Martin in urging support for the bill said, ". . . we had snow yesterday, that reminded me of Christmas. And then I felt that, 'By golly, yeah, Christmas is almost here, and the people have got to receive a present.' And this is nice, at long last Alaska, everyone, receives an equal present. . . . So in conclusion, I'd like to repeat an old message from a friend of ours, old Scrooge, who says, Merry, Merry Christmas to all and to all a good night! So let's vote on this unanimously." (R. 227-28) It seems not to have occurred to Rep. Martin that his desire to give Alaskans an *equal* present is not served by the durational residency based distributions.

> income from oil, gas, and other mineral production to help offset rising fuel costs.

§1(d), Chap. No. 21, Laws of Alaska, 1980.

Representative Brown argued in favor of the direct monetary distribution program because "the cost of living here is higher, the cost of transportation is higher. Even if we got rid of many of the other things that cause it, just the fact of our environment would still keep our cost of living higher than most states." (R. 221).

One defendant, Commissioner of Revenue Thomas Williams, recognized the importance to the State's residents of this supplement to personal income when he told this Court by Affidavit:

> It is my firm impression that residents of these outlying communities are depending on these dividends to defray a significant portion of their living expenses for the upcoming winter. While many of the residents in these outlying communities maintain a limited subsistence lifestyle, they depend heavily upon cash during the harsh Alaskan winter when relatively few wildlife resources are available upon which to subsist and when expensive energy needs are the greatest. Simultaneously, it is a well known fact of the seasonal Alaskan economy that fewer jobs, and thereby less cash income, are available to these residents in the winter. Thus, the relative value of these dividends to Alaskans situated in the outlying communities is much greater in the winter than in other seasons when subsistence resources are more abundant and a stronger economy exists to provide jobs and needed income. While the relative impact between a wintertime distribution and one at some other time of the year for residents of urban Alaska communities is not as great, the cost of fuel and other forms of energy of these residents during the long, cold Alaska winters is a significant cost of living which these residents, too, are counting on their dividends to help offset.

Affidavit of Thomas K. Williams, p.5 attached to Opposition of the State of Alaska to the Application for Stay of Mandate of the Supreme Court of the State of Alaska.[15]

If the halt in distribution ordered by this Court in November, 1980, caused the hardship, disadvantage and loss sworn to by the defendant, then the operation of this program through the years will annually cause the same deprivation for the new residents of Alaska who face the same high cost, seasonal economy described in the affidavit, but who will receive a small fraction of the benefits given to long-time residents.

In determining whether the permanent denial of an equal share in these unconventional monetary benefits penalizes the new migrant on the basis of the exercise of a fundamental right, the Court below and the State of Alaska have mechanically limited the principles of *Shapiro* and *Memorial Hospital* to "basic necessities of life" and therefore summarily declared that those cases have no application to the program before the Court. The state has argued that the Permanent Fund dividend program is not premised on need and therefore *Shapiro* does not apply. It has also argued that denial of an equal dividend will not deter new migrants and therefore is not a penalty on migration. The State and the Court below are in error for several reasons.

Memorial Hospital and *Shapiro* did not limit the penalty analysis to "necessities of life." They declared the denial of welfare and medical assistance for one year to be clearly penalties. The State is apparently arguing that those cases only have application to statutes where the State has limited the distribution of its largesse to those in need. Need has no meaning in a context where a State has decided to give all of its citizens a supplement to their income solely on the basis of length of residency. Acceptance of the State's position could lead to a rather startling result. This Court has already held that there is no substantive right to "basic necessities." *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970). The State's position would mean that a State could completely avoid *Shapiro* by

[15]Attorney General Avrum Gross told the Superior Court that distribution of the benefits of oil development is a "strange problem" and that it is "nonetheless difficult in trying to find an equitable and reasonable way to distribute benefits to needy people." (R. 286).

abolishing need-based welfare programs and channeling its largesse through a distribution program based solely on length of residency.[16]

The State's arguments based upon deterrence of migration are similarly fallacious. As this Court said in *Dunn v. Blumstein*, 405 U.S. at 339-41 and *Memorial Hospital v. Maricopa County*, 415 U.S. at 257-58, the *Shapiro* penalty analysis is not dependent upon a finding of actual deterrence caused by a durational residency requirement. This Court said that such an argument was a "fundamental misunderstanding of the law." The penalty on interstate migration is determined by looking to how the new migrant is treated once he arrives, not whether he was deterred. There is no need to discuss a hypothetical injury to a hypothetical future traveler. The appellants in this case have suffered a real and present injury solely because they exercised their constitutionally guaranteed right of interstate migration. Certainly those citizens who have come to Alaska since 1959 could not have been deterred by a law passed in 1980, but that does not change the deprivation they are now suffering because they exercised their right to come to Alaska at a later time.

Even if the "necessities" argument were accepted, *Shapiro* and *Memorial Hospital* involved durational residency requirements of one-year in length. The court below is in error when it holds that, in all other governmental benefit programs, the States are free to impose unlimited durational residency periods. As the dissent below said, "If such treatment were permissible the requirement that durational residency periods be reasonable and limited in scope would lose most of its meaning." *Williams v. Zobel*, 619 P.2d 448, 466 (1980) (Dimond J., dissenting).

There is one other independent reason that the statute has such a severe impact on a new resident's interests that it must

[16]That such a result is politically impossible and therefore an idle fear is contradicted by the fact that Alaska presently has special housing and assistance programs for the elderly that are limited to persons who have lived in the State for as long as 30 years. Alaska Stat. §47.25.020-.035, Alaska Stat. §47.45.010.

be held to be a penalty on interstate migration and subjected to strict scrutiny. The revenues in the Alaska Permanent Fund do not come from any individual contributions. Instead they come primarily from the sale of publicly owned resources held in trust for all the people of the State, including new residents. The distribution statute is therefore a determination of the right that each citizen has to publicly owned natural resources in a property law sense.

Section 1(c) declares that the statute "fairly compensates each state resident for his equitable ownership of the state's natural resources since the date of statehood." This is in effect a determination that the oil, gas and mineral resources of the State, including the largest oilfield in North America, is primarily owned by long-time residents of the State and that new migrants to the State will permanently be denied an equal share in those resources. For the Court to allow this kind of redistribution of public resources solely on the ground of length of residency would sanction a severe penalty upon migration and make possible massive raids on the resources of public land States through the device of a durational residency classification.[17]

When a state holds in trust a resource which is owned by the general public, this Court should look with considerable skepticism upon any governmental schemes which will have the effect of reallocating that resource to a privileged portion of the public or subject public property to the self-interest of private parties. *See Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).

The Alaska Supreme Court has previously stated what is true of any public land State, "The framers of our state con-

---

[17]Alaska has already attempted to distribute public land on the basis of lengthy durational residency requirements. *See Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979) (State land disposal based on durational residency up to ten years unconstitutional on other grounds). Large discounts on the sale of public lands in Alaska are allowed at present for each year of residency. Alaska Stat. §38.05.058.

stitution were united in the view that the lands and other natural resources of this abundant State are among its most prized assets." *Moore v. State*, 553 P.2d 8, 30 (Alaska 1976). For a State to deny permanently an equal share in the State's greatest asset is certainly as serious a deprivation as a one-year denial of welfare or non-emergency medical care. It cannot be permitted in a country which is premised upon unity and which seeks to protect the free movement that makes such unity possible.

B. THE STATUTE SHOULD BE SUBJECTED TO STRICT SCRUTINY AS A DEPRIVATION OF EQUALITY OF CITIZENSHIP

In *Shapiro v. Thompson*, 394 U.S. 632-33 (1969) this Court held that equal protection forbids a State from apportioning benefits and services according to the past tax contributions of its citizens. One reason that equal protection forbids such an apportionment is that the first sentence of the Fourteenth Amendment contains a specific textual guarantee of State citizenship to all persons who are bona fide residents of a State.

Prior to the enactment of the Fourteenth Amendment, the constitution left it entirely to the State to determine the criteria for and the attributes of State citizenship. A State was perfectly free to discriminate among its citizens by granting certain classes of citizens, property holders for example, various rights while withholding them from others. *See, Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1873); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-05 (1857); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 242 (1833). Conversely, criteria established by the State to qualify for State citizenship were entirely irrelevant in determining the meaning of "citizen of a State" for purposes of the Federal Constitution. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-06 (1857).

The first sentence of the Fourteenth Amendment was designed to overrule *Dred Scott* and to give the concept of State citizenship a federal component. The nature of this new substantive right was soon spelled out in the *Slaughter-House Cases*, 83 U.S. at 80.

> It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.

Accord, Oregon v. Mitchell, 400 U.S. 112, 285-86 (opinion of Stewart, J., concurring and dissenting, with whom Burger, C.J., and Blackmun, J., joined) (1970).

Justice Bradley, while dissenting on other grounds, put the case for this new substantive right even more firmly:

> The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and abide in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. . . . If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.

83 U.S. at 112-13.

Bona fide residence has become synonymous with State citizenship. *Blake v. McClung*, 172 U.S. 239, 247 (1898). By the terms of the Fourteenth Amendment, all persons born or naturalized in the United States are explicitly citizens of the State in which they reside. *Milliken v. Meyer*, 311 U.S. 457, 463-464 (1940).

The Fourteenth Amendment forbids a State from totally denying State citizenship to a citizen of the United States residing within its borders. Classifying persons who are undoubtedly State citizens solely on the basis of when they attained their citizenship is equally offensive.[18] The Fourteenth Amendment grants both Federal and State citizenship in terms of unmistakable clarity. It creates a specific, inviolable

---

[18]Appellants are not arguing that the grant of state citizenship carries any specific affirmative entitlements. Resolutions of that question can wait for another day. Instead, they simply assert that, at a minimum, the grant operates as a limitation on the power of the States to classify as between *bona fide* residents.

relationship between the citizen and the State.[19] "Once acquired, this Fourteenth Amendment citizenship was not to be

---

[19]Underlying the concept of citizenship in the United States is the tenet that the relationship between the State and its citizens is like a contract.

> This well known doctrine presumes that all men once existed in a state of nature; that they eventually came together to form a government to satisfy their mutual needs; and that the resultant agreement, which substituted civil rights for natural rights, was a social contract.

E. K. Bauer, *Commentaries on the Constitution 1790-1860* at 254 (1965). From the writing of the Mayflower Compact to the present, the concept of a consensual joining together of persons to form a contractual government is fundamental to our constitutional law and philosophy.

As in any contract, the contract between the citizens and the state implies reciprocal obligations between the parties; the citizen gives up certain natural rights to obtain the protections of the state. *Luria v. United States*, 231 U.S. 9, 22 (1913). One of the natural rights a citizen gives up in contracting with the state is the right to be treated differently from other citizens, in return for the undifferentiated protection of his own interests. DeTocqueville called this expectation of equality in citizenship the highest passion of Americans:

> I think that democratic communities have a natural taste for freedom: left to themselves, they will seek it, cherish it, and view any privation of it with regret. But for equality, their passion is ardent, insatiable, incessant, invincible: they call for equality in freedom; if they cannot obtain that, they still call for equality in slavery. They will endure poverty, servitude, barbarism—but they will not endure aristocracy.

A. DeTocqueville, Democracy in America in *Sources of Democracy* 77 (S. Padover ed. 1973). Thus, the American citizen expects the right to approach the state without regard to the quality of his or her citizenship: to establish citizenship means to join on equal footing with all other citizens.

The American passion for equality in citizenship is a reflection of historical western thought. Samuel Puffendorf, whose works greatly influenced John Locke, wrote in 1688:

> [H]owever much one man may excel others in mental and bodily gifts, he is none the less bound to exercise toward them the duties of natural right, and he may expect the same of others as well, nor for all his gifts, is he allowed any greater license to injure others. Thus, however niggardly nature or fortune has been toward a man, he is not condemned on that score to share less fully than others in the benefits of the law. But whatever one man can claim or hope for from another, the same others can claim or hope for from him, other things being equal, and whatever law a man appeals to against another, he must under every circumstance admit against himself.

[footnote continued]

S. Puffendorf, "De Jure Naturae er Gentium Libri Octo in *Classics of International Law* 332 (J. B. Scott, ed.) (1934)." Similarly, J. Rousseau's *Social Contract* stated that rational and natural basis for equality in standing in citizenship:

> We are bound then to distinguish clearly between the respective rights of the citizen and the Sovereign, and between the duties the former have to fulfill as subjects, and the natural rights they should enjoy as men.
>
> . . . .
>
> The undertakings which bind us to the social body are obligatory only because they are mutual; and their nature is such that in fulfilling them we cannot work for others without working for ourselves. . . . There is not a man who does not think of 'each' as meaning him. . . . This proves that equality of rights and the idea of justice which such equality creates originates in the preference each man gives to himself, and accordingly in the very nature of man.

J. Rousseau, *The Social Contract and Discourses*, 28-29 (1950).

When these philosophical constructs gave birth to the French and American revolutions, they found a civil and legal voice. Equal stature of citizenship gained explicit recognition in the constitutions of both France and the United States. In France the prohibition against classification of citizenship was explicit:

> The law is an expression of the will of the community. . . It should be the same to all, whether it protects or punishes; and all being equal in its sight, are equally eligible to all honors, places, and employments, according to their different abilities, without any other distinction than that created by their virtues and talents.

French Declaration of the Rights of Man and of the Citizen (1789) in *Sources of Democracy* 325-326 (S. Padover ed. 1973).

In the American Constitution, on the other hand, Article I, Section 9 states simply "No title of nobility shall be granted in the United States." A corroborative insight into the values behind this stark statement, however, provided by the Virginia Bill of Rights (1776), makes clear that the values underlying the titles of nobility clause were the same as the French Consitution.

> [N]o man, or set of men, are entitled to exclusive or separate emoluments, or privileges from the community, but in consideration of public service.

Virginia Bill of Rights (1776) in *Sources of Democracy*, 302-304 (S. Padover ed. 1973).

The doctrine of equal stature in citizenship maintains such a strong hold on American values that it is a basic aspect of our exported doctrine. After World War II, when the United States had great influence over the drafting of the Constitution of Japan, this clause was inserted:

> All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status or family origin.

[footnote continued]

shifted, cancelled, or diluted at the will of the federal government, the States or any other governmental unit." *Afroyim v. Rusk*, 387 U.S. 253, 262 (1967).[20]

This grant of State citizenship does not mean that neutral criteria unrelated to the quality of one's citizenship may not be used to condition access to State benefits. For example, clearly welfare benefits can be limited to those who are in need of them. However, if a welfare program is to be implemented then the benefits must be extended to all State citizens who need them. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Given the substantive federal content of the concept of State citizenship, a State's power to impose durational residency requirements should be limited to testing for bona fide residence. Once a permissible waiting period has been satisfied, the States should be powerless to impose classifications based upon length of residence. The State has no legitimate interest in so distinguishing between persons whose right of State citizenship is anchored in the Fourteenth Amendment.

In *Dunn v. Blumstein*, 405 U.S. 330, 354 (1971), this Court recognized this concept when it stated:

> [T]he State appears to confuse a bona fide residence requirement with a durational residence requirement. As already noted, the State does have an interest in limiting the franchise to bona fide members of the community. But this does not justify or explain the exclusion from the franchise of persons, not because their bona fide residence is questioned, but because they are recent rather than longtime residents.

Peers and peerage shall not be recognized.

No privilege shall accompany any award of honor, decoration or any distinction.

Kenpo (Constitution) Chapter III, Article I.

[20]It has been said, in a related context, that "[c]itizenship obtained through naturalization is not a second-class citizenship." *Knauer v. United States*, 328 U.S. 654, 658 (1946).

The durational residency requirement which is before this Court is not a litmus test for citizenship. Indeed, it is not a test of anything. As this Court held in *Shapiro*, equal protection forbids such an attempt to apportion benefits between new and old citizens.

III. THE ASSERTED PURPOSES OF THE ALASKA PERMANENT FUND DISTRIBUTION ACT'S DURATIONAL RESIDENCY CLASSIFICATION ARE NOT PERMISSABLE, NOT COMPELLING NOR ARE THEY EVEN RATIONALLY RELATED TO IT

When legislative classifications implicate a fundamental right, such as interstate migration, such governmental action may withstand constitutional scrutiny only when the State meets its burden by a clear showing that the statutory scheme is precisely tailored to further a compelling governmental interest. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963).

A State may not use a durational residency classification if the same objective could be reached by less restrictive means. *Barnes v. Board of Trustees*, 369 F.Supp. 1327, 1335-36 (S.D. Mich. 1973) (three-judge court); *See NAACP v. Button*, 371 U.S. 415, 438 (1963); *Sheldon v. Tucker*, 364 U.S. 479, 488 (1960). When no suspect criterion or fundamental right is involved, the classification must nonetheless be reasonable, not arbitrary, and rationally and fairly related to a permissible government objective. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). The factor which is the basis for differentiating between persons may not be capricious or irrelevant. It must be germane to the effectuation of the State's legitimate interests. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 533-35 (1973); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

The Alaska Supreme Court and the defendants have spent much time below explaining the beneficial objects of the Alaska Permanent Fund and the subsequently enacted system of direct distribution of earning. These explanations miss the

point. The State must show that the durational residency classification itself, not the beneficial purposes of the Permanent Fund or the distribution statute as a whole, serve compelling, or at least valid State interests. *Barnes v. Board of Trustees*, 369 F.Supp. at 1336. The Alaska Permanent Fund is a unique device for saving some of Alaska's oil wealth for the future needs of the State. The appellants are not challenging the existence of the Permanent Fund. The Fund was created four years before the distribution statute was enacted and the mandatory savings plan will continue to operate no matter what happens in this litigation.

Likewise, the State and the Court below praise the virtues of limiting government growth by directly distributing public money to the State's citizens. The appellants have not challenged the direct distribution system itself and regard its creation to be within the province of the legislature.[21] The appellants also concede the constitutional validity of limiting dividend payments to bona fide residents of Alaska. But the saving of Alaska's oil wealth and limiting the "painless" growth of the Alaska State government have absolutely nothing to do with the radical durational residency-based distribution challenged in this litigation.

Three purposes are asserted as justification for the durational residency based distribution and its retroactivity to 1959, the year of Alaska Statehood. They are listed in the statute itself:

> (1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the State's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;

---

[21]Because of the non-severability provision of §4 of the Act, if the durational residency based distribution is declared unconstitutional the entire distribution system is of no force and effect and the legislature would have to pass a new law if it wished to continue the direct distribution system. This section indicates that the Legislature was more interested in distributing money disproportionately to long-term residents than distributing money as a check on government growth.

(2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the State; and

(3) to encourage increased awareness and involvement by the residents of the State in the management and expenditure of the Alaska permanent fund.

§1, Chap. No. 21, Laws of Alaska (1980).

A. DISTINGUISHING BETWEEN NEW AND OLD RESIDENTS FOR THE PURPOSE OF COMPENSATING FOR CONTRIBUTIONS TO THE STATE IS NOT A PERMISSIBLE GOVERNMENTAL OBJECTIVE

The State has argued that "an equitable distribution" means rewarding longer-term residents for their contributions to the State. The majority below was clearly in error when it accepted the State's argument that the durational residency based distribution could be justified by the purpose of awarding past contributions, intangible or tangible, to the State. This Court on at least two occasions has held that a State may not allocate its resources or services to its longer-term residents on a past contributions rationale. Thus, in *Shapiro* the Court stated:

> Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. . . . Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of State services.

394 U.S. at 632-33

In *Vlandis v. Kline*,[22] the Court indicated that a reasonable durational residency requirement could be used in some circumstances "as one element in demonstrating bona fide residence." 412 U.S. at 452. The Court went on to reject the State's argument that past contributions in taxes could justify a distinction between old and new bona fide residents.

> But even if we accepted the State's argument that its statutory scheme operates to apportion tuition rates on the basis of old and new residency, that justification itself would give rise to grave problems under the Equal Protection Clause of the Fourteenth Amendment. For in *Shapiro v. Thompson, supra,* the Court rejected the contention that a challenged classification could be sustained as an attempt to distinguish between old and new residents on the basis of the contribution they have made to the community through past payment of taxes.

412 U.S. at 450 n.6.

There are weighty considerations for not allowing a State to justify durational residency classifications on the ground of past contributions. Acceptance of such a rationale would remove even the mildest limits on durational residency classifications and lead to a "pervasive and profound inequality in nearly all phases of a State's relationship with its citizens." *Williams v. Zobel,* 619 P.2d 422, 429 (Alaska 1980) (per Dimond, J.). The arbitrary use of the power to classify some of a State's citizens is even more possible with use of the vague "past intangible contributions" argument. It is little more than a deliberate decision by the State that long-term residents are its more worthy citizens and entitled to special legal privileges denied other citizens.[23]

---

[22]Since the rejection in *Vlandis* in 1973 of the "past contributions" rationale this Court's summary affirmance in *Starns v. Malkerson,* 401 U.S. 985 (1971) *aff'g mem.*, 326 F. Supp. 234 (D. Minn. 1970) stands only for the proposition that a one-year durational residency requirement is permissible in some circumstances.

[23]The irrational prejudice toward new residents that is at the root of the view that long-term residents naturally deserve more legal rights than new residents was even evidenced in the opinion of the Alaska Supreme Court.

[footnote continued]

The abuses possible by legislatures dominated by long-term residents are readily apparent. The statute before the Court is one of those abuses. It is an attempt to raid the public wealth of a rich State through the device of a durational residency requirement. As the dissent below stated, the statute "has the effect of insulating long-term residents from sharing the State's oil wealth with newcomers during what is likely to be the critical years of the distribution of funds." *Williams v. Zobel,* 619 P.2d 448, 471 (Dimond, J., dissenting). Compensating for past contributions to the State is surely not a compelling State interest. *Cole v. Housing Authority of City of Newport,* 435 F.2d 807, 813 (1st Cir. 1970).

Past intangible contributions are not even rationally related to the benefit provided by the statute. Previous discussions of "past tax contributions" have at least involved tax investment in public facilities. *See Memorial Hospital v. Maricopa County,* 415 U.S. at 286 (Rehnquist, J., dissenting). No citizen of Alaska, past or present, has paid to put the oil and minerals in the ground. On the contrary, those resources belong to all Alaskans in common. In the factual context of this dispute many new residents have made the past contributions or efforts which made the recent development of Alaskan oil possible. This was pointed out in the floor debate on the bill:

> The pipeline is the entity that has allowed us all this latitude to do all the things we're considering doing, not only today but throughout the session. And without that

---

The Court went to great lengths to cite Alaskan history since the Gold Rush to show that Alaska suffers from "large numbers of people from without the State [who] move in, derive great financial and other benefits from the State's resources and opportunities, and then move out to enjoy the fruits of their labors elsewhere." *Williams v. Zobel,* 619 P.2d 448, 459-60 (Alaska 1980). The view that new or short-term residents are "exploiters" of Alaska is a grossly over-generalized stereotype and simply inconsistent with Alaska's place in the Union. *See also* the references to "boomers and cheechakos" (Remarks of Rep. Hayes, R. 234), to "Texans and Okies and different people from the Lower 48" (Remarks of Rep. Hurlbert, R. 210). The "gold watch" analogy used by the court below (619 P.2d at 460) ignores the fact that we are discussing a State government and its citizens, not an oil company and its employees. In the United States, there can be no "seniority system" among citizens of a State.

> pipeline, and without newcomers, we couldn't have built that pipeline. Without their skill, without their money, the pipeline wouldn't be there. So I get a little bit tired of — and I've got a hunch an awful lot of people who have been here five or six or seven or ten years, whatever we knock off as newcomers, get a little bit tired of being chastised and penalized and discriminated against for having not been born here or not been here 30 or 40 or 50 years.

(Remarks of Rep. Randolph, R. 208-09).

When the individual contributions of the many new residents who helped build the Alaskan pipeline are compared with those of long-term residents who have spent their lives in prisons or institutions for the criminally insane, the irrationality of judging an individual's contributions to a State on the basis of length of residency becomes apparent. New residents in Alaska work in hospitals saving lives, work the oil fields, run some of the most important economic, financial, and communications institutions in the State and stand guard against foreign invasion.[24] For the majority below to allow the State to judge an individual's contributions to the State by the number of years he has lived there is to indulge an irrational overbroad generalization. *Cf. Cleveland Board of Education V. LaFleur,* 414 U.S. 632, (1974); *In re Griffiths,* 413 U.S. 717, 719, 722 (1973); *United States Department of Agriculture v. Moreno,* 413 U.S. 528, 534-38 (1973); *Reed v. Reed,* 404 U.S. 71 (1971); *Carrington v. Rash,* 380 U.S. 89 (1965).

B. ENCOURAGING RESIDENTS TO REMAIN IN THE STATE OF ALASKA IS NOT A COMPELLING STATE INTEREST, NOR IS IT RATIONALLY RELATED TO THE DURATIONAL RESIDENCY CLASSIFICATION

The State has asserted that giving away money based on how long one has resided in the State is part of a State plan to

---

[24]The statistics cited by the court below demonstrate that non-residents and new residents have made substantial contributions to the Alaska economy. *Williams v. Zobel,* 619 P.2d 448, 459 n.33 (1980).

achieve a stable population. The permanent fund distribution program is said to be related to attaining a stable population in two ways, not attracting new residents to the State and encouraging present residents to remain in the State. Reducing population turnover is not a permissible governmental objective to the extent it includes discouraging persons from migrating to a State, even if the public benefit programs provided by the State are a factor in the decision to migrate. *Gaddis v. Wyman*, 304 F.Supp. 713, 717 (S.D.N.Y. 1969) (three-judge court) *aff'd mem. sub nom. Wyman v. Bowens*, 397 U.S. 49 (1970); *Shapiro v. Thompson*, 394 U.S. at 631-32.

The State argued below that the purpose of encouraging orderly population growth would not be served if the distribution program benefited all the residents equally because the annual payments would act as a "magnet," drawing large numbers of people into the State who might otherwise have hesitated, or have chosen not to come at all. To the extent that the durational residency classification is aimed at discouraging new residents who would enter the State solely to obtain higher benefits, it is as impermissible as the durational residency classification in *Shapiro*. "[T]he class of barred newcomers is all inclusive lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits." 394 U.S. at 631.

This "magnet" argument has nothing to do with the appellants or the other residents who came to Alaska between 1959 and 1980. The program created in 1980 could not have served as a magnet for them and therefore cannot justify the retrospective grant of cumulative dividends back to 1959 for long-term residents.

Moreover, even if an equal benefit program would encourage some new migrants to come to Alaska,[25] those new

[25]This seems a dubious proposition considering the high cost of living and the high cost of travel to the State. But if true, this "magnet" problem is created by the direct distribution program itself. A state cannot be allowed to enact a program which creates a social problem (attracting new residents to the State) and then solve the problem with an invidious classification.

migrants have a right to consider any State benefit program as much as any other State facility, service or attribute in deciding to move to the State. *Shapiro v. Thompson*, 394 U.S. at 631-32. *Accord, Wyman v. Bowens*, 397 U.S. 49 (1970).

Even if it were permissible, the State's purpose of encouraging a stable population is certainly not compelling. As the Court below noted, population movements are a necessary by-product of the right of interstate migration. 619 P.2d at 460. Solving the "problems" caused by free movement cannot justify an invidious classification based on recent travel. As this Court stated in *Edwards v. California:*

> the State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. . . . But this does not mean that there are no boundaries to the permissible area of State legislative activities. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed on the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

314 U.S. 173-74.

Even assuming an unquestioned power to protect the State's economy from population turnover, the State cannot discriminate against its new residents if reasonable alternatives, adequate to serve legitimate local interests are available. *See Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). The alternative means of creating a stable population could include, but are not limited to, using the earnings from the oil wealth to provide better public services in the State or

using it to create economic opportunities that will reduce or eliminate the boom and bust cycle in Alaska. The Legislature's discretion is broad but not limitless.

The State has never explained why it is compelling, or even permissible, to create greater incentives for longer term residents to remain in the State. There is no reasonable basis for the State to give someone who arrived in 1960 more money than someone who arrived in 1970 if the goal is to discourage both of them from severing their ties with Alaska. As the dissent below pointed out, if the goal is to stop population turnover, giving the most money to the portion of the population that has already demonstrated its attachment to the State makes little sense. 619 P.2d at 469 (Dimond, J., dissenting). When examined closely this asserted purpose dissolves into the assertion that long-term residents are simply more worthy citizens. The statute cannot be saved by such an arbitrary legislative decision.

C. INCREASING PUBLIC INVOLVEMENT IN THE PERMANENT FUND IS NOT A COMPELLING STATE INTEREST NOR IS IT RATIONALLY RELATED TO THE DURATIONAL RESIDENCY CLASSIFICATION

The legislature stated it wanted "to encourage awareness and involvement by the residents of the State in the management and expenditure of the Alaska permanent fund." §1 (b) (3), Chap. 21, Laws of Alaska, 1980. This purpose has been interpreted by the Attorney General and the court below as creating incentives for support for the prudent management of the fund and incentives against "immediate and rapid development of the State's mineral resources." 619 P.2d at 462. The Court below said that if the distributions were made equally to all residents, the residents of the State would know that as the population increases the benefits to the individual resident would decrease and therefore the present population of the State would demand risky investments by the managers of the Fund and rapid development of the State's resources. 619 P.2d at 462. This is just another way of saying that the durational residency based distribution is necessary to encourage

political support for a particular investment or natural resource policy. The Superior Court judge who originally ruled the plan unconstitutional held that this reason was insufficient under any standard of review.

The State of Alaska has never shown why one group of bona fide residents should be given an incentive to be more interested in the fund than other residents. This Court has held on numerous occasions that the need to engender political support for a State program will not justify an otherwise impermissible classification. *Baldwin v. Fish and Game Commission*, 436 U.S. 371, 391-92 n.24 (1978); *Memorial Hospital v. Maricopa County*, 415 U.S. at 266; *Shapiro v. Thompson*, 394 U.S. at 641. Nor will citing concern over the protection of the public fisc justify a durational residency requirement. *Memorial Hospital v. Maricopa County*, 415 U.S. at 263-65; *Rivera v. Dunn*, 329 F.Supp. 554 (D. Conn. 1971), *aff'd*, 404 U.S. 1054 (1972). In *Cole v. Housing Authority of Newport*, the court rejected the argument that incentives for the support of public housing projects would justify a durational residency requirement because it would prevent the political constituency from thinking they had to share their housing projects with future new residents. 435 F.2d 807, 811-12 (1st Cir. 1970).

Contrary to the State's assertion the goal of creating interest in the fund and concern for its wise management would be furthered by giving every resident an equal share in the fund's earnings. The State's concern for preventing incentives for unwise management or rapid development of the State's mineral resources does not explain why the interests of long-time residents should be "counterbalanced" by reducing the benefits given newer residents. This counterbalance theory is a bootstrap argument that cannot support giving long-term residents dividends retrospective to 1959. The argument assumes that the incentives given to long-term residents for larger present earnings must be balanced by creating a constituency against immediate gratification. That does not explain why those chosen to receive the honor are new residents.

To the extent that the existence of the distribution program itself creates political support for large present earnings from

the fund, it is an example of the State creating a social problem which it says it must "solve" by giving less of the public resources to new residents. This is akin to the State saying that providing public schools creates demands for better schools that can only be satisfied if the State gives the better schools to long-time residents. Such an argument, of course, has nothing to do with creating general interest in the school system but has everything to do with making sure the long-time residents get the best schools.

The assertion by the Attorney General that the legislature thought it was enacting a program that had a resource conservation purpose is completely unsupported by the legislative history. This alleged purpose is a total after-the-fact fabrication that is completely unrelated to the statute's true purpose. Even if the program could somehow be transformed into a conservation program by the Attorney General, this Court said in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 285 n.21 (1977) "[a] statute that leaves a State's residents free to destroy a natural resource while excluding aliens or nonresidents is not a conservation law at all." In similar fashion a statute which gives long-time residents an interest in risky investments and rapid development while creating disincentives for new residents to support such a program is not a conservation law at all.

IV. SOSNA SETS OUT AN ALTERNATE MODEL UNDER WHICH THIS STATUTE SHOULD ALSO BE DEEMED UNCONSTITUTIONAL

A. THE INDIVIDUAL AND FEDERALISM INTERESTS WHICH THIS STATUTE IMPACTS OUTWEIGH THE INTERESTS WHICH THE STATE MAINTAINS IT FURTHERS

In *Sosna v. Iowa*, 419 U.S. 393 (1975), the opinion of this Court departs from the models discussed previously. In *Sosna*, this Court upheld the constitutional validity of an Iowa statutory requirement that a petitioner in a divorce action be a resident of the State for one year preceding the filing of the petition. Rather than focusing on the nature of the individual

interest asserted and from that determining the appropriate level of scrutiny, the Court appears to have applied a balancing test. The interest of the State of Iowa was held to outweigh the constitutional claims asserted. 419 U.S. at 406-409.

To the extent that the right of interstate migration has been recognized as a liberty interest,[26] a comparison of the relative interests would seem appropriate. This mode of analysis would also seem consistent with the approach of Mr. Justice Stevens in his dissenting opinion in the recent case of *Harris v. McRae*, 100 S.Ct. 2671, 2713 (1980).[27]

Whatever the conceptual origin, *Sosna* can certainly be read for the proposition that balancing the comparative interests is an appropriate method of constitutional decision making in this area.[28] Under this model, the question for this Court would be framed as follows: In light of the comparative interests involved, is the durational residency requirement before this Court reasonable in length?[29]

In the ordinary case, assessing the relative importance of the interests being asserted involves only a comparison of the

[26]*Kent v. Dulles*, 357 U.S. 116, 125-127 (1958)

[27]"This case illustrates the flaw in the method of equal protection analysis by which one chooses among alternative 'levels of scrutiny' and then determines whether the extent to which a particular legislative measure furthers a given governmental objective transcends the predetermined threshold. See *Craig v. Boren*, 429 U.S. 190, 211-212 (Stevens, J., concurring). That method may simply bypass the real issue. The relevant question in this case is whether the Court must attach greater weight to the individual's interest in being included in the class than to the governmental interest in keeping the individual out." 100 S. Ct. at 2713 n.4

[28]In *Duplantier v. United States*, 606 F.2d 654, 672 n.39 (5th Cir. 1979), the Fifth Circuit read *Sosna* for exactly that proposition. Appellants certainly do not mean to suggest that *Sosna* should be read as saying that balancing is the only proper method of constitutional decision making in durational residency cases. Rather, they assume that this Court concluded in *Sosna* that no penalty was present and began its analysis from that point.

[29]Framing the question in this fashion is consistent with the requirement that durational residency requirements must be reasonable in length articulated in the cases cited at pages 12-14.

interests of the individual and the rule making entity. In the context of durational residency requirements, however, one more factor must be added to the balance. Where a State imposes a durational residency requirement, the Federal system also has an interest which is at stake. This federalism concern will vary with the severity of the requirement being imposed. It is certainly more heavily implicated in a situation involving a cumulative open-ended durational residency requirement than it is in a situation in which a State has imposed a simple one year waiting period.

In some situations, welfare or voting for example, the individual and federalism interests so clearly outweigh the State's interest in imposing a durational residency requirement that only the most minimal of requirements can be imposed.

In other situations, the individual and federalism concerns might be of lesser relative importance and thus a longer waiting period might permissibly be imposed. For example, a one year durational residency requirement for obtaining a resident hunting or fishing license might fall into this category. Finally, there are cases in which the State is asserting an interest of great importance such that it outweighs the individual and federalism interests even though they might be fairly weighty themselves. *Sosna* seems to be a case of this variety. This rationale would also explain the upholding of relatively lengthy durational residency requirements in the governmental office category.[30] However, even in those cases the requirement imposed must be reasonable in length.

In some cases then, the balance will be so clearly tipped toward the individual and federalism interests that only the most minimal of requirements will be permissible. In others, the balance might shift in favor of allowing a State to impose a relatively longer waiting period. Whatever the parameters of such an analysis, one thing seems clear. It is difficult, if not impossible, to imagine a set of circumstances where the individual and federalism interests were of such little impor-

[30] *Chimento v. Stark*, 353 F. Supp. 1211 (D.N.H.) *aff'd* 414 U.S. 802 (1973).

tance or the State's interest was of such enormous magnitude that a retrospective, cumulative, open-ended and theoretically infinite durational residency requirement could be deemed to be reasonable in length.

In this case, the individual interests are of great importance, the very nature of the classification raises grave federlism concerns and the interests which the State of Alaska asserts are being furthered by this classification are utterly insubstantial. Under any conceivable balancing test, the result below should be reserved.[31]

B. THE CLASSIFICATION OF NEW RESIDENTS IS NOT FAIRLY AND SUBSTANTIALLY RELATED TO THE PURPOSES ARTICULATED BY THE STATE

Sosna has also been read for the proposition that discrimination which is aimed at new residents is to be subjected to some intermediate level of equal protection review.[32] This analysis has lead at least one commentator to observe, "Thus, after *Sosna* one might conclude that the line of cases from *Shapiro* through *Sosna* establishes newcomers as a class that will be viewed by the Court with about the same level of suspicion as that accorded classification on the basis of sex." McCoy, *Recent Equal Protection Decisions — Fundamental Right To Travel or "Newcomers" As A Suspect Class?* 28 Vand. L. Rev. 987, 1016 (1975). There is certainly a sound theoretical basis for such an approach. As discussed previously,[33] new residents, as a class, share many of the attributes of other classifications which have been termed suspect. Particularly in Alaska, one can demonstrate a long history of irrational or unnecessary discrimination against this group.[34]

[31]The majority below did purport to employ a balancing test. 619 P.2d at 453. However, the test which they employed utterly denegrated the federalism interests which are implicated by legislation like this and was unduly sensitive to the "problems" of the State of Alaska.

[32]*See, e.g., Fredrick L. v. Thomas*, 408 F.Supp. 832, 835 (E.D.Pa. 1976); *Lucas v. Secretary, Department of Health, Education & Welfare*, 390 F.Supp. 1310, 1316, n.5 (D.R.I. 1975).

[33]*Supra* at 19.

[34]*See* Footnote 13.

Professor Tribe has attempted to catalog the techniques of intermediate review. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §16-30 (1978). His categorization offers five techniques employed in such review. He terms them assessing importance, demanding close fit, requiring current articulation, limiting after-thought and permitting rebuttal. The import of all these techniques is to ascertain whether legislative classifications actually substantially further important State interests.

The first of these is very similar to the balancing technique which has been previously described. As the relative importance of the interest at stake rises, greater justification is required of the rule making entity.

The second technique which Professor Tribe describes is that of demanding a close fit between means and ends. This technique of review has also been referred to as the fair and substantial relationship test or strict rationality. Under this analysis, the classification must bear more than a hypothetical relationship to the articulated goals.[35] A cumulative open-ended durational residency requirement is not fairly and substantially connected to any of the State's articulated purposes. The fit between means and ends is discussed in Section III, *supra*.

Another technique, which clearly seems appropriate in this case, is limiting the use of after-thought. The State's contention that this classification is a resource conservation measure is clearly the baldest sort of after-thought. Nowhere in the entire legislative history can one word be found which suggests that a single legislator thought that this classification was a resource conservation tool. This argument was concocted in the mind of the Attorney General after this litigation began. It should not be allowed.

---

[35] Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 Harv. L.Rev. 1 (1972).

The final technique which Professor Tribe describes is requiring that the legal scheme be altered so as to permit rebuttal in individual cases even where the scheme is not struck down altogether. Here, the Alaska legislature has precluded this option with a specific nonseverability clause. The legislature was clearly not interested in allowing persons to demonstrate that they should be classified on any other basis than the duration of their residency.

Anything more than the most deferential review conceivable will result in a reversal of the lower court. Since this statute clearly intended to single out new residents as a class and since the justifications offered by the State of Alaska for the classification are so tenuous, any meaningful inquiry into the actual basis of the classification, as opposed to some hypothetical exercise, will result in invalidation of the statutory scheme.

CONCLUSION

This Court has never seen a durational residency requirement as extreme in its terms as this one. Its myriad constitutional flaws simply serve to demonstrate the inequities inherent in all durational residency classifications. Where they are to be allowed, their use should be carefully circumscribed.

This program is founded on nothing other than the notion that persons who have lived in Alaska the longest are its most deserving citizens. That view is inconsistent with Alaska's place in the Union.

If this Court does not reverse the Alaska Supreme Court, the distributions made under this program during the next ten years will be counted in billions of dollars. The Court should reverse the judgment of the Alaska Supreme Court and declare the statute before the Court to be unconstitutional.

APPENDIX

APPENDIX A

Article IX, Section 15 of the Alaska Constitution

Section 15. Alaska Permanent Fund. At least twenty-five per cent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.

APPENDIX B

LAWS OF ALASKA
1980

Source	Chapter No.
FCCSSB 122	21

AN ACT

Providing for the payment of Alaska permanent fund income to state residents; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1, LINE 10

Approved by the Governor: April 15, 1980
Actual Effective Date: April 16, 1980 with Sections 1 and 2 retroactive to January 1, 1979.

AN ACT

Providing for the payment of Alaska permanent fund income to state residents; and providing for an effective date.

*Section 1. POLICY, PURPOSES AND FINDINGS. (a) It is the duty and policy of the state with respect to the natural resources belonging to it and the income derived from those natural resources to provide for their use, development, and conservation for the maximum benefit of the people of the state.

(b) The purposes of this Act are

(1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;

(2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and

(3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund (art. IX, sec. 15, state constitution).

(c) The legislature finds that the accrual of permanent fund dividends provided in AS 43.23 enacted in sec. 2 of this Act, based on full years of residency since January 1, 1959, fairly compensates each state resident for his equitable ownership of the state's natural resources since the date of statehood. It is in the public interest to distribute a portion of Alaska's energy wealth to the people of the state.

(d) The legislature also finds that state residents have been paying increasingly high prices for fossil fuels, while few have received direct monetary benefits from the production and development of fossil fuels belonging to them as Alaskans. It is in the public interest to return to state residents a portion of the state's income from oil, gas, and other mineral production to help offset rising fuel costs.

(e) The legislature also finds that there exists in the state a serious problem of population turnover. A substantial portion of the state's population is comprised of individuals who reside in Alaska for only a relatively short time. This constant turnover in

population leads to political, economic, and social instability and is harmful to the state. It is in the public interest for the state to promote a stable resident population by providing an incentive to encourage Alaskans to maintain their residency in the state.

*Sec. 2. AS 43 is amended by adding a new chapter to read:

CHAPTER 23. PERMANENT FUND DIVIDENDS.

Sec. 43.23.010. ELIGIBILITY FOR PERMANENT FUND DIVIDEND. (a) An individual who is eligible under (b) of this section is entitled to one permanent fund dividend for each full year that the individual is a state resident after January 1, 1959.

(b) For each year, an individual is eligible to receive payment of the permanent fund dividends for which he is entitled under this section if he

(1) is at least 18 years of age; and

(2) is a state resident during all or part of the year for which the permanent fund dividend is paid.

(c) To determine the number of permanent fund dividends to which an individual is entitled under (a) of this section, a year in which the individual is a state resident for less than 12 months may not be counted, but a payment of a permanent fund dividend may be made for that year under (f) of this section. A year for which an individual was entitled to payment of a dividend but failed to file a claim may be counted to determine the number of dividends under (a) of this section.

(d) An individual may receive payment of a permanent fund dividend in a single payment or in 12 equal installments paid monthly by the department.

(e) An individual eligible to receive payment of a permanent fund dividend may elect to defer receipt of that payment. The commissioner shall adopt by regulation a plan which, to the extent permitted under federal law, will allow an individual to defer payment of federal and state income taxes on the payment of permanent fund dividends until the individual actually receives the payment.

(f) If an individual who is eligible under (b) of this section was a state resident for less than 12 months during the year immediately preceding the year in which a claim is filed, the individual is entitled to payment of one prorated dividend. If that individual is also entitled to dividends under (a) of this section based on previous years as a state resident, he is entitled to receive a prorated payment for the total number of permanent fund dividends to which he is entitled under (a) of this section. A prorated dividend or prorated payment under this subsection shall be prorated on the basis of the number of months that the individual was a state resident during the year immediately preceding the year in which the dividend is claimed.

Sec. 43.23.020. PROOF OF ELIGIBILITY. (a) The commissioner shall adopt regulations under the Administrative Procedure Act (AS 44.62) for determining the eligibility of individuals. The commissioner may require an individual to provide proof of eligibility, or he may use other information available to him from other state departments or agencies to determine the eligibility of individuals. The commissioner may establish procedures for paying the permanent fund dividends along with other payments of money or state benefits.

(b) The department may prescribe and furnish an application form for claiming a permanent fund dividend which contains

(1) a statement of eligibility and a certification of residency in substantially the following form:

> I certify that I am a state resident on the date of this application and I have been a state resident for _____ full years and that I understand that my claim for a permanent fund dividend is determined by the length of my residence in the state after January 1, 1959. I also understand that a false claim of residency to obtain a permanent fund dividend is a criminal offense and that if convicted I will forfeit all permanent fund dividends and that I must repay all permanent fund dividends which have been paid to me. I understand that this penalty is in addition to any criminal penalties imposed.
>
> (signature of individual)

and

(2) a statement advising the individual that he may choose to receive the payment of a permanent fund dividend in a single payment or in 12 installments payable monthly and a space where the individual may indicate his choice of payment.

Sec. 43.23.030. AMOUNT OF DIVIDEND. By December 1 of each year the commissioner shall give public notice of the value of each permanent fund dividend to be paid in the following year. The commissioner shall determine the value of a permanent fund dividend by

(1) determining the amount of income of the Alaska permanent fund transferred to the dividend fund under AS 43.23.050(b) in the current year, less the amount, if any, to be repaid in the current year to the general fund under AS 43.23.050(c);

(2) determining the number of permanent fund dividends paid during the current year; and

(3) dividing the amount determined in (1) of this section by the amount determined in (2) of this section.

Sec. 43.23.040. PENALTIES AND ENFORCEMENT. (a) In addition to any criminal penalties imposed by state law, if an individual is convicted of unsworn falsification for a statement made in a certification of residency made for purposes of this chapter, and the conviction is not reversed, that individual is not, and may never become, eligible for a permanent fund dividend, and he forfeits all permanent fund dividends paid to him.

(b) If the commissioner determines that a permanent fund dividend should not have been claimed by or paid to an individual, he may use any collection procedures or remedies available under this title to recover the payment of a permanent fund dividend which was improperly made.

Sec. 43.23.050. DIVIDEND FUND ESTABLISHED. (a) The dividend fund is established as a separate fund in the state treasury. The dividend fund shall be administered by the commissioner and may be invested by the commissioner in the same manner provided for the investment of the Alaska permanent fund under AS

37.13.120. Money in the dividend fund and any interest earned from investment of money in the dividend fund shall be used to pay permanent fund dividends annually and to repay loans from the general fund as provided in (c) of this section.

(b) Each year the commissioner shall transfer to the dividend fund 50 percent of the income of the Alaska permanent fund which was earned during the fiscal year ending on June 30 of the preceding year and which is available for distribution under AS 37.13.140.

(c) The legislature may annually appropriate money from the general fund to the dividend fund if there is not enough money in the dividend fund to pay each eligible individual an annual permanent fund dividend valued at $50. One-fifth of the amount transferred to the dividend fund each year under (b) of this section shall be annually withdrawn from the dividend fund by the commissioner and deposited in the general fund to repay appropriations made under this subsection.

Sec. 43.23.060. DUTIES OF THE DEPARTMENT. The department shall

(1) by the 10th day of each regular legislative session, present a request to the legislature for an appropriation from the general fund to the dividend fund to satisfy the requirements of AS 43.23.050;

(2) annually pay permanent fund dividends from the dividend fund;

(3) adopt regulations under the Administrative Procedure Act (AS 44.62) which establish procedures and time limits for claiming a permanent fund dividend; the department shall set the time limit for applications for permanent fund dividends so that single-payment

permanent fund dividends for a year are paid before October 15 of the following year and so that installment-payment permanent fund dividends for a year begin by October 15 of the following year; and

(4) assist residents of rural areas who because of language, illness, old age, or inaccessibility to public transportation need assistance to establish eligibility and to apply for permanent fund dividends.

Sec. 43.23.070. EXEMPTION OF PERMANENT FUND DIVIDENDS. (a) An eligible individual may assign, pledge, or encumber not more than 50 percent of the annual permanent fund dividends which are due and payable or which may become due and payable to the individual.

(b) Fifty percent of the annual permanent fund dividends payable to an individual is exempt from levy, execution, garnishment, attachment, and any other remedy for the collection of a debt.

(c) Fifty percent of the annual permanent fund dividends paid to an individual which are not held separately from other money of the individual is exempt from levy, execution, garnishment, attachment and any other remedy for the collection of a debt.

Sec. 43.23.080. ELIGIBILITY FOR STATE PUBLIC ASSISTANCE PAYMENTS. In determining the eligibility of an individual for old age assistance under AS 47.25.430-47.25.610, aid to the blind under AS 47.25.620 - 47.25.780, or aid to the permanently and totally disabled under AS 47.25.790 - 47.25.970, the Department of Health and Social Services may include as income of the individual only the amount of the

permanent fund dividends in excess of $1,500 paid to the individual for a year.

Sec. 43.23.090. TAX EXEMPTION. Permanent fund dividends provided under this chapter are excempt from taxation under AS 43.20.

Sec. 43.23.100. DEFINITIONS. In this chapter,

(1) "Alaska permanent fund" means the fund established by art. IX, sec. 15, of the state constitution;

(2) "commissioner" means the commissioner of revenue;

(3) "department" means the Department of Revenue;

(4) "dividend fund" means the fund established by AS 43.23.050;

(5) "individual" means a natural person;

(6) "permanent fund dividend" means a right to receive a payment of money from the dividend fund;

(7) "state resident" means an individual who is physically present in the state with the intent to remain permanently in the state or, if he is not physically present in the state, intends to return to the state and he is absent for the following reasons:

(A) vocational, professional or other special education for which a comparable program was not reasonably available in the state,

(B) postsecondary education,

(C) military service,

(D) medical treatment,

(E) service in Congress, or

(F) other reasons which the commissioner may establish by regulation under the Administrative Procedure Act (AS 44.62);

(8) "year" means a calendar year.

*Sec. 3. For 1979 the value of a permanent fund dividend is $50. The payment of permanent fund dividends for 1979 shall be made from an appropriation from the general fund to the dividend fund for that purpose. The amount appropriated from the general fund to pay permanent fund dividends for 1979 less 50 percent of the income of the Alaska permanent fund earned during the fiscal year ending June 30, 1978, is a loan to the dividend fund from the general fund which shall be repaid as provided in AS 43.23.050(c) enacted by sec. 2 of this Act. The Department of Revenue shall by July 1, 1980, prescribe and make available an application form for claiming permanent fund dividends for 1979. The Department of Revenue shall mail the form to each individual who, before July 1, 1980, filed a resident or part-year resident Alaska net income tax return for the 1979 tax year under AS 43.20. An eligible individual may receive payment of permanent fund dividends for 1979 if he applies to the Department of Revenue on the form prescribed by the department no later than September 1, 1980. The application must be accompanied by a statement of eligibility as required by AS 43.23.020 enacted in sec. 2 of this Act.

*Sec. 4. If any provision enacted in sec. 2 of this Act is held to be invalid by the final judgment, decision or order of a court of competent jurisdiction, then that

provision is nonseverable, and all provisions enacted in sec. 2 of this Act are invalid and of no force or effect.

*Sec. 5. Sections 1 and 2 of this Act are retroactive to January 1, 1979.

*Sec. 6. This Act takes effect immediately in accordance with AS 01.10.070(c).

Office Supreme Court, U.S.
FILED
MAY 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1146

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RONALD M. ZOBEL and PATRICIA L. ZOBEL,
Appellants,

v.

THOMAS WILLIAMS, Commissioner of Revenue,
and STATE OF ALASKA,
Appellees.

On Appeal from the Supreme Court of the State of Alaska

BRIEF OF APPELLEES

WILSON L. CONDON
Attorney General
SUSAN A. BURKE
COUNSEL OF RECORD
Assistant Attorney General
AVRUM M. GROSS
Special Counsel to the Attorney General
State of Alaska
Department of Law
Pouch K, State Capitol
Juneau, Alaska 99811
(907) 465-3600
Counsel for Appellees

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

	Page
Statement of the case	1
Summary of argument	1
Argument	3
I	
Introduction	3
II	
The Permanent Fund dividend program distributes earnings from the Permanent Fund in a manner uniquely calculated to achieve important state objectives	8
III	
The dividend distribution plan does not penalize the right of interstate migration	17
IV	
The dividend plan does not infringe on any federally guaranteed right of state or national citizenship	29
V	
The purposes of the Permanent Fund dividend plan are valid, and those purposes are rationally related to the particular means chosen to effect them	34
Conclusion	46

TABLE OF AUTHORITIES CITED

Cases

Page

Arizona v. California, 283 U.S. 423 (1931) 16
Baldwin v. Montana Fish and Game Commission, 436 U.S. 371 (1978) 31, 32, 34, 37, 38, 41, 44
Blake v. McClung, 172 U.S. 239 (1898) 31
Califano v. Torres, 435 U.S. 1 (1978) 41
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 42
Cole v. Housing Authority of Newport, 435 F.2d 807 (1st Cir. 1970) 38
Corfield v. Coryell, 6 F. Cas. 546 (E.D. Pa. 1825) 30, 31
Craig v. Boren, 429 U.S. 190 (1976) 40
Dandridge v. Williams, 397 U.S. 471 (1970) 36
Dean Milk Co. v. Madison, 340 U.S. 349 (1951) 36
Dunn v. Blumstein, 405 U.S. 330 (1972) 18, 20, 29, 30
Edwards v. California, 314 U.S. 160 (1941) 17, 38
Frank v. Maryland, 359 U.S. 360 (1958) 33
F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 45
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 34
Isakson v. Rickey, 550 P.2d 359 (Alaska 1976) 39
Leland v. Oregon, 343 U.S. 790 (1952) 33
Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 21, 22, 23
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 18, 19, 24, 25, 27, 29, 30, 33, 37, 38
Minnesota v. Clover Leaf Creamery Co., 49 U.S.L.W. 411 (U.S. Jan. 21, 1981) 34
New Orleans v. Dukes, 427 U.S. 297 (1976) 34, 36
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 46
Patterson v. New York, 432 U.S. 197 (1977) 33
Powell v. Alabama, 287 U.S. 45 (1932) 33

TABLE OF AUTHORITIES CITED

CASES

Page

Rivera v. Dunn, 329 F.Supp. 554 (D. Conn. 1971), *aff'd mem.*, 404 U.S. 1054 (1972) 37

San Antonio School District v. Rodrigues, 411 U.S. 1 (1973) 22, 23

Schweiker v. Wilson, 49 U.S.L.W. 4207 (U.S. March 23, 1981) 41

Shapiro v. Thompson, 394 U.S. 618 (1969) 17, 18, 20, 24, 27, 29, 30, 33, 36, 38

Snyder v. Massachusetts, 291 U.S. 97 (1934) 33

Sosna v. Iowa 419 U.S. 393 (1975) 19, 20, 29, 30, 40

Speiser v. Randall, 357 U.S. 513 (1958) 33

Stanley v. Illinois, 405 U.S. 645 (1972) 41

Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971) 19, 30

Starr v. Haagland, 374 P.2d 316 (Alaska 1962) 15

State v. Adams, 522 P.2d 1125 (Alaska 1974) 39

State v. Erickson, 574 P.2d 1 (Alaska 1978) 39

Thomas v. Bailey, 595 P.2d 1 (Alaska 1979) 14, 15

Toomer v. Witsell, 334 U.S. 385 (1948) 44

U. S. v. Guest, 383 U.S. 745 (1966) 17

United States v. O'Brien, 391 U.S. 367 (1968) 16

United States Railroad Retirement Board v. Fritz, 49 U.S.L.W. 4035 (U.S. Dec. 9, 1980) 34, 39, 41

Vlandis v. Kline, 412 U.S. 441 (1973) 19, 30

Williams v. Zobel, 619 P.2d 411 (Alaska 1980) 14

Williams v. Zobel, 619 P.2d 448 (Alaska 1980) 13, 17, 42

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 36

Constitutions

Alaska Constitution, Article IX, Sec. 15 13

United States Constitution:

Article IV 30

Fourteenth Amendment 29, 30, 33

TABLE OF AUTHORITIES CITED

Statutes

	Page
Chapter 236, 1968 Session Laws of Alaska	4
Chapter 114, 1969 Session Laws of Alaska	4
Chapter 250, 1971 Session Laws of Alaska	4
Chapter 147, 1975 Session Laws of Alaska	4
Chapter 21, section 1(b), 1980 Session Laws of Alaska	13

Other Authorities

Alaska House Journal, 2d Session, 11th State Legislature, 965, 966 (1980)	22
Alaska Senate Journal, 2d Session, 11th State Legislature, 754 (1980)	22
E. Gruening, The State of Alaska (1968)	3
G. Gunther, The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine On A Changing Court: A Model for a New Equal Protection, 86 Harv.L.Rev. 1 (1972)	39
1980 Joint House and Senate Journal Supplement No. 7 (April 2, 1980)	8
McCoy, Recent Equal Protection Decisions—Fundamental Right to Travel or Newcomers as a Suspect Class? 28 Vand. L.Rev. 987 (1975)	21
C. M. Naske, An Interpretative History of Alaskan Statehood (1973)	3
Revenue Sources, FY 1980-82, Alaska Department of Revenue (January, 1981)	7
State of Alaska Election Pamphlets, 1978, 1980	22
L. Tribe, American Constitutional Law § 16-31 at 1089-92 (1978)	39, 42

No. 80-1146

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RONALD M. ZOBEL and PATRICIA L. ZOBEL,
Appellants,

v.

THOMAS WILLIAMS, Commissioner of Revenue,
and STATE OF ALASKA,
Appellees.

On Appeal from the Supreme Court of the State of Alaska

BRIEF OF APPELLEES

STATEMENT OF THE CASE

Appellees agree in substance with appellants' review of the procedural history of this case set out in their Statement of the Case.

SUMMARY OF ARGUMENT

A portion of Alaska's oil wealth is placed each year in a constitutionally created fund whose principal is not subject to legislative appropriation. Fifty percent of the earnings of the fund are returned to Alaskans each year in the form of dividends. Each resident annually receives one

dividend for each year of residency in the State. As residency increases, annual dividends for each resident increase cumulatively. The dividend program gives each resident a personal interest in prudent management policies for the Permanent Fund and cautious development of the State's mineral resources (which provide the principal of the fund), since only if the fund is adequately preserved will revenues for his future increased dividends be available. Additionally, the cumulative feature of the dividend distribution plan provides an incentive for all residents to become long term members of the Alaska community—an important goal in a State that has been plagued with a high rate of population turnover and its attendant social and economic problems.

This case is fundamentally different from those cases previously before this Court which have dealt with prohibitions directed solely at new residents of a state and which are generally held to be burdens on the fundamental right to travel. This plan treats all residents of the State, new or longer term, exactly the same insofar as their legal rights of participation in the plan are concerned. The plan does not burden the right to travel to Alaska and make a home in the State. It is, in fact, structured so as to encourage the exercise of that right. The issue, then, is not whether the distribution plan is necessary to accomplish compelling state interests, but whether the method of distribution is rationally related to the purposes of the program.

The clearly legitimate purposes of the distribution plan—the encouragement of wise resource development and conservative management of the Permanent Fund, equitable distribution of Permanent Fund income, and the promotion of a stable, long term population for the state—bear a substantial and rational relationship to the cumulative method chosen to distribute dividends to residents each year.

ARGUMENT

I

INTRODUCTION

This case brings before the Court a novel plan under which the State of Alaska distributes wealth excess to present government needs directly to the residents of the State. Every resident without any waiting period or any qualification of need is entitled to receive each year one dividend for every year of residence within the State. Years of residency may be accrued from 1959, the date Alaska became a State and came into possession of the resources from which the wealth is derived.

A plan by which government literally issues dividends to residents of a state is unique in American political tradition. It is, however, a plan specifically tuned to the unusual economic and political problems existent in Alaska today, and before the legal issues concerning the plan can be viewed in perspective, it is first necessary to understand the particular circumstances that led to its creation.

In 1967, a major oil field was discovered on State owned lands in Prudhoe Bay. After literally centuries of nonexistent government services and widespread poverty, the find at Prudhoe Bay appeared to represent economic salvation for the State.[1] The promise became reality when, in 1969, the State leased additional acreage at Prudhoe Bay. Cash bonus bids received at the lease sale equaled roughly $900 million, a massive infusion of revenue to a State of approximately 300,000 people whose total annual budget

---

[1]For a general review of the economic situation in Alaska prior to and shortly after Statehood, *see*, C. M. Naske, An Interpretative History Of Alaskan Statehood (1973); E. Gruening, The State Of Alaska (1968).

in 1969 was $124,000,000.[2] The future appeared bright, since most residents assumed that more massive oil finds were imminent and that the revenues from Prudhoe Bay and other finds would produce great wealth for the State.

By 1975, the situation had drastically changed. The Trans-Alaska pipeline necessary for production of Prudhoe Bay oil had been held up by litigation and no significant royalties or taxes were flowing to the State. There had been no significant new oil finds. The $900 million was gone as a result of vastly increased public spending[3] that left little of lasting consequence, and the State was facing a massive budget deficit. Revenue from Prudhoe Bay oil would shortly be forthcoming, but the residents of Alaska looked to the future with a slightly more realistic understanding of what "oil wealth" meant to them.

The primary lesson derived from this experience was that oil wealth, unlike revenues of the State derived from renewable resources, was finite in nature. The $900 million for instance, had been a one time bonus—its loss was irreplaceable. Eventually, all of the wealth derived from oil would be gone and with it, any attendant resource development industries. The State faced a problem basically unknown to other states or, for that matter, most nations—a resource dominating the economy that would create huge amounts of wealth for a limited period of time and no amounts of wealth thereafter.

---

[2]Chapter 236, 1968 Session Laws of Alaska (SLA).

[3]The total budget for all state government functions in Alaska had increased from approximately $70,000,000 in FY 1960 to $124,000,000 (Ch. 236 SLA 1968) in FY 1969. In FY 1970, the budget increased to $154,000,000 (Ch. 114 SLA 1969). The FY 1971 budget, the first following the oil sale, jumped to $314,000,000 (Ch. 250, SLA 1971) and by FY 1975, the annual expenditures had reached $462 million (Ch. 147, SLA 1975).

One option available to the State was simply to enjoy the bonanza while it lasted and leave the problems to future generations. To the credit of its people and its political leaders, the State rejected that option, at least in part. While oil wealth has benefitted present day Alaskans well, the residents of the State have initiated a program by which at least a portion of the oil wealth will be saved for future generations—a program by which some of the finite oil revenues can be translated into sustained economic benefits. The program is called the Permanent Fund.

In 1976, the citizens of the State of Alaska adopted a constitutional amendment establishing a fund comprised of a percentage of the rentals, royalties and lease sale proceeds received from oil and gas development in the State. The principal of this fund may not be appropriated by the legislature for any purpose; only the earnings from investment of the principal may be utilized for government programs.[4]

The Permanent Fund was created for two basic reasons. First was a recognition of the fact that the oil wealth available to Alaska today is limited in duration—that unlike funds generated by development of renewable resources such as timber or fish, revenues from oil development will end at some fixed time. Government programs established from today's oil wealth will require future funding from other sources, which may or may not be available. Accordingly, steps had to be taken to insure that ongoing government programs did not become dependent on limited oil wealth. By placing a portion of the oil revenues in a constitutionally protected fund, and by permitting only the sustained earnings from the fund to be

---

[4]The full text of the Permanent Fund Constitutional provision is set out in Appendix A to Appellants' brief.

appropriated for government services. Alaskans insured that these services could continue for themselves and future residents far past the time when the oil itself was gone.

The second reason for the creation of the fund stemmed from Alaskans' dissatisfaction with the manner in which the $900 million had been dissipated. Through the mechanism of a constitutional amendment, Alaskans sought to insure that some of the future oil money would not be spent on costly government projects which might be politically appealing but in the end would prove both unnecessary and wasteful. By placing at least a portion of oil revenues in the fund, the State insured that the waste would at least be minimized.

Even the earnings from the Permanent Fund were substantial, however, which led to similar concerns over the possible waste of money and the unwarranted growth of government. Government growth is a concern everywhere, but in Alaska the problem has a peculiar twist. In most states, increases in government expenditures are irrevocably tied to an increase in individual taxes—a political debit to counterbalance the benefits bestowed by any new program. In Alaska, however, since public revenues can be raised from the sale and development of oil leases, personal taxes need not be imposed, and there is no counterbalancing debit. New government programs can be established without ever affording the electorate a clear political choice. Increased government, however, has social and political implications that should require political choices. A major Alaskan issue then was how to create those choices—how to bring home to the people the fact that it was money from development of their resources that was used to increase the size of government.

The solution was unique in its simplicity. Instead of leaving the way open for all of the earnings from Permament Fund principal to be used for funding new government programs, a portion of the earnings would be distributed directly to the people in the form of dividends. If subsequent legislatures chose to create new programs, they would be required to fund those programs by using earnings from the fund which otherwise would be distributed to the people or by using revenues that could be deposited instead in the Permanent Fund to produce additional earnings for dividend distribution. It was a system set up to duplicate the choices the legislature must make when it raises individual taxes to fund new government programs—a method of creating a constituency with an interest in overseeing the growth of government because with that growth would come a corresponding decrease in dividends received.

Annual permanent fund dividends are presently small,[8] but they are an important symbol of the relationship between the people of Alaska, the resources that the State holds in trust for them, and the Permanent Fund in which a part of the revenues those resources is contained. Management of the principal of the fund now has a direct bearing not only on the general economy of Alaska but on the annual amount of dividends each Alaskan will receive. Moreover, since the fund is created from resource development, each and every Alaskan has an interest in overseeing

[8]The annual dividend for each year of residency is now fifty dollars. Since annual payments are made to the principal of the Permanent Fund, it is anticipated that both the principal and the earnings of the fund will increase in the future, and the value of each dividend will increase in the future. Permanent Fund dividend distribution for 1981 is estimated to total $130,000,000, which state revenues for FY 81 are estimated to be in excess of 3.6 billion dollars. Revenue Sources, FY 1980-82, Alaska Department of Revenue (January, 1981).

that development—a critical and desirable goal in Alaska where the future is entirely dependent on wise choices in resource utilization. The dividend plan is not simply a modern version of share-the-wealth—it is, instead, an experiment in controlling government growth through involving a state's population directly and personally in the management of resources that belong to them.

II

THE PERMANENT FUND DIVIDEND PROGRAM DISTRIBUTES EARNINGS FROM THE PERMANENT FUND IN A MANNER UNIQUELY CALCULATED TO ACHIEVE IMPORTANT STATE OBJECTIVES

The establishment of the Permanent Fund and the conservative plan subsequently adopted for management of the principal of the fund[6] evidenced a basic commitment by Alaskans to forego at least some immediate short term benefits from oil wealth in favor of achieving long term goals. The specific method chosen by the legislature

---

[6]The decision as to how the principal of the Permanent Fund was to be managed was made after three years of difficult and vigorous legislative debate. The legislature eventually rejected proposals which would have authorized the principal to be used for parochial but risky local investments to benefit present Alaskan residents in favor of a highly conservative investment plan. The Free Conference Committee which authored the final measure justified its choice in these terms:

> "In making their decision on the Alaska Permanent Fund, The Free Conference Committee has focused on a single question—the management of the Fund's principal.
>
> • • •
>
> The Fund is designed to be a trust which focuses on the safety of principal first and the maximization of earnings second. It is a trust held to a more restricted list of investments than most other fiduciary trusts including the Alaska State Pension Funds . . ."

1980 *Joint House and Senate Journal Supplement No.* 7 (April 2, 1980).

to distribute dividends from the earnings of the fund evidences the same commitment. Under this distribution method, all residents are entitled to receive annually one dividend for each year they have resided in the State. The cumulative feature of the plan means that while all residents have exactly equal rights to derive benefits from the plan over time, individual residents will receive varying amounts from year to year, dependent on how long they have participated in the program through their maintenance of State residency. In any one year, for instance, a three year resident would be entitled to three dividends while a ten year resident would receive ten dividends. The following year, the then four year resident would receive four dividends, while the then eleven year resident would receive eleven. Each subsequent year would bring increased cumulative dividend distributions to these and all other residents.

The key feature of this method of distribution is that no matter when an individual begins his participation in the plan, through birth or migration, the total number of dividends received in the future will always be greater than the number of dividends received today. The system gives every single resident a personal interest in insuring that as his cumulative dividends increase, the Permanent Fund remains a steady and regular source of earnings from which those dividends may be paid. That in turn will occur only if the resources on which the future of the fund depends are developed wisely, and the funds from the development carefully managed. In essence, the cumulative feature of the plan insures that the personal financial interests of all residents, present and future, will coincide with the overall public interest in maintaining a Permanent Fund not only capable of funding necessary government services when oil is gone but also capable of providing a source for dividend payments far into the future.

The manner in which the cumulative method of distribution serves to encourage interest in prudent management of the Permanent Fund is perhaps best demonstrated by contrasting this method with the method which, in appellants' view, would be most desirable—an annual per capita distribution of equal amounts to each resident. Instead of instilling in residents an interest in assuring that there will be a healthy income stream from the fund in future years, a per capita distribution is more likely to have precisely the opposite effect. Under a system of per capita distribution, as the population of the State increases, individual shares in the total amount to be distributed are necessarily diluted, and individual annual dividends will decrease. On the other hand, if Permanent Fund earnings were rapidly accelerated in the early years of a per capita distribution program before the population grew substantially, then residents during those early years would receive greater annual payments than they would be likely to receive in future years when population growth would be a substantial factor in determining the per capita share. The impact of inevitable population growth on a per capita distribution would create obvious pressures on the legislature to provide for an immediate and rapid acceleration in the growth rate of Permanent Fund earnings so as to maximize dividends for present day residents.

There are only two ways in which the rate of growth in Permanent Fund earnings can be accelerated on a short term basis. The first is by increasing the percentage return on investments of fund principal. But a significantly higher rate of return would require investments that carry a correspondingly higher risk of capital losses, and this kind of investment policy would totally frustrate the long term goals sought to be achieved through the Permanent Fund. The second way that earnings from the fund can be quickly increased is by quickly increasing the amount of principal

that is available for investment. That, in turn, could only be accomplished by increasing the percentage contributions of mineral resource revenues flowing into the fund or through maximum and immediate development of the resources themselves. Increasing contributions to the Fund would be desirable, but eventually contributions would reach one hundred percent. At that point, there would be inevitable demands for immediate lease sales and for early extraction of minerals, even if prudent resource management dictated that more revenues ultimately would be obtained if lease sales and mineral extraction were postponed far into the future. This might serve the interests of present day Alaskans well, but it would do a disservice to future generations of State residents.[7]

The real problem faced by the legislature in selecting a method of dividend distribution was to insure that the same personal interest motivation which is at the heart of the dividend plan did not act to destroy it by creating present pressures for distribution contrary to the long term goals of the Permanent Fund itself. The cumulative method of dividend distribution avoids those present pressures, substituting in its place a system by which every single resident has a long term interest in prudent management of the Permanent Fund and the resources on which it depends.

---

[7]This is a particularly serious problem when distributing wealth from finite non-renewable resources like oil. If all of the present benefits from a renewable resource like timber or fish were to be distributed today, there would be little danger that future residents would be deprived of similar benefits. But the benefits from oil are available only so long as the oil remains. As trustee of the State's natural resources, today's government has an obligation to insure that tomorrow's residents will benefit at least in part from this finite resource.

The cumulative system also furthers a separate and distinct purpose of the distribution plan. Any dividend distribution plan might well provide an incentive for new migrants to come to Alaska. But the cumulative system provides not only an incentive to migrate but an additional incentive for both new and longer term residents to stay, since the future promises larger and larger cumulative distributions. In a small state which still possesses a very real sense of community, a cumulative system of dividend distribution has the effect of encouraging both new migrants and persons born in Alaska to continue their residence so as to become long term members of the community.

Alaska's inability to maintain a stable, long-term population in the face of its historically high cost of living, harsh climate, geographic isolation and dependence on a seasonal economy has created social and economic problems that have plagued the State through years of boom and bust. The incentives provided by the cumulative method of dividend distribution may not be enough to cause every resident with reasons to move from Alaska to maintain residence in the State. But it will certainly be a factor that every resident will consider in making that decision.[8]

---

[8]"Throughout its history, from the days of the Gold Rush to the recent oil pipeline period Alaska has been prone to the phenomenon that large numbers of people from without the state move in, derive great financial and other benefits from the state resources and opportunities; and then move out to enjoy the fruits of their labors elsewhere. This obviously results in a great drain of financial and other resources from the state.

* * *

Since this problem is a necessary by-product of the free exercise of the right of interstate migration, neither Alaska nor any other state may attempt to ameliorate it by penalizing an individual for choosing to exercise the right to migrate. However, this does not preclude an attempt to reward those Alaskan residents who have

The appellants have focused their argument in this case on the fact that while rights to participate in the distribution plan are the same for all residents, in any one year individual residents will receive differing amounts of cumulative dividends. They assert that this differential means that the plan is in the nature of a durational residency requirement, one that is inconsistent with the right of interstate migration, rights of state citizenship, and the equal protection of the law. We shall discuss these points in detail, but before proceeding to that discussion, we should like to comment at least briefly on appellants' general view of the dividend plan and the purposes which lie behind it.

In rather graphic terms, appellants have dismissed the stated purposes of this act[9] in favor of a broad attack on the legislature, the executive branch and the judicial system in Alaska. The legislature is accused of having the overriding purpose of establishing "financial policies that would insulate long time Alaskans from sharing the fruits of Alaska's development." Appellants' Br. at 8. The Attorney General of the State is accused of "concocting" a purpose for the Act as an "afterthought." Appellants' Br.

---

chosen to stay, to enjoy the fruits of their labor here, and to make a lasting contribution tangible or intangible, to the state's culture and commonwealth." Williams v. Zobel, 619 P.2d 448, 459-60 (Alaska 1980).

[9]Sec. 1(b) Ch. 21, SLA 1980 specifies the purposes of the dividend distribution plan to be:

> (1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;
>
> (2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and
>
> (3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund (art. IX, sec. 15, state constitution).

at 47. The Alaska Supreme Court is charged with having demonstrated "irrational prejudice toward new residents" in its analysis of the case. Appellants' Br. at 36 n.23. These allegations are both intemperate and erroneous. They are based on a haphazard and misleading representation of legislative debate on the issue, and a basic misunderstanding of the operation of the distribution system itself.

The comments of individual legislators quoted in appellants' brief are highly misleading. For instance, appellants mention that there was a tax bill pending before the legislature at the same time as the Permanent Fund bill but do not point out that most of the comments quoted are aimed at *that* bill.[10] Nor do appellants note that other

[10]The tax measure provided that all persons (resident or nonresident) who filed income tax returns for three years were thereafter exempt from tax liability. It was prompted, in large measure, by legislative concern that transients such as those who had come to Alaska during the construction of the Trans-Alaska pipeline pay their fair share for state services. The measure was held invalid by the Alaska Supreme Court, which held that though the measure on its face was not directed at new residents, the impact of the remaining tax liability would fall disproportionately upon recent migrants and penalize the exercise of their right to travel which the court concluded was an important right under the *State* Constitution. Williams v. Zobel, 619 P.2d 411 (Alaska 1980). This is, of course, the same court which in appellants' view has an "irrational prejudice toward new residents." The same "irrational prejudice" has been demonstrated in a series of past Alaska cases that have taken the concept of the right to travel substantially *beyond* the limits articulated by this Court. *E.g.*, State v. Adams, 522 P.2d 1125 (Alaska 1974) (one year residency period for divorce *invalid* under State constitution as penalty on right to travel); *and see*, Rabinowitz, J., concurring in Thomas v. Bailey, 595 P.2d 1 (Alaska 1979):

> The uniquely important status of right-to-travel protection of the Alaska Constitution reflects, in part, an awareness of the distinctive character of this state in attracting many new residents to participate in Alaska's growth and expansion. *Id.* at 16

Chief Justice Rabinowitz is the author of the opinion below in this case.

comments by individual legislators specifically rejected the very prejudice claimed to exist in the body as a whole.[11] But most important, appellants fail to note that individual legislator comments on either side of an issue have been specifically rejected in Alaska as a source of legislative intent, just as they have been by this Court as a source of Congressional intent.[12]

---

[11]For instance, in response to the lengthy comments of Representative Randolph quoted at pp. 7-8 of appellants' brief, Representative Cotten replied:

> Of course, I'm not a constitutional lawyer either, but I feel like both these bills do address the problem that he has pointed out, in that everyone is treated alike. The taxpayers that have been here and have made their—have filed their returns over the past years, they needn't be residents, so we really aren't discriminating against residents—residents versus nonresidents. Nor are we discriminating against newcomers. In fact, I don't think anyone here really is opposed to seeing newcomers. I think that the complaints you hear more often than about newcomers are about the people that come and stay for a season and leave, and don't ever have any intention of staying. And those people that do want to come and make Alaska their home can—can build their longevity and build their ability to collect under these programs. . . . (R. 212.)

Representative Brown, whose comments are cited in appellants' brief also stated in remarks which are not so included:

> We are not doing something that restricts interstate travel of individuals. That is usually the kind of thing that—argument that is made for striking down things based upon residency. We are not doing anything that restricts the ability for someone to get a job, to get gainful employment or to vote, simply because he wishes to exercise his constitutional right to travel among the various states. (R. 223.)

[12]Starr v. Haagland, 374 P.2d 316 (Alaska 1962). (Comments of individual convention delegates irrelevant in interpreting consti-

The basic fallacy in the way appellants view this plan lies in their assertion that it establishes two classes of people—long term residents who receive all the benefits of Alaska's development and "newcomers" who are denied the "fruits" of that development. This view permeates appellants' brief, and removes many of their arguments a good way from the real issues. For instance, in discussing citizen involvement in the management of the Permanent Fund and Alaska's resources, appellants state that Alaska has never shown why "one group" of residents should be given an "incentive to be more interested in the fund than other residents." Appellant's Br. at 43. And in discussing incentives to stay in the State, appellants question why the State should be allowed to create "greater incentives for longer term residents to remain in the state." Appellants' Br. at 41. In both cases, appellants miss the basic point—that the *amount* of money received at any one time is not the critical feature of the distribution method. What is critical is that no matter *how* long you have resided in the State, no matter how much one receives at any one time, *all* residents will receive more the longer they stay. It is the cumulative feature, not the annual amount that makes this plan work. If, in fact there were two classes of residents established by this plan, appellants' arguments might have some substance. But there is no defined class of "newcomers" or "old-timers." Each resident has the same right as any other to an annual dividend, each has the same right to accumulate dividends, and any differences in annual amounts received apply uniformly to short term, middle term, or long term residents. This is not a plan that insulates and rewards only

---

tutional provision); Arizona v. California, 283 U.S. 423, 455 (1931) (the motives of Congress are not a proper subject of judicial inquiry); United States v. O'Brien, 391 U.S. 367, 383 (1968) (court should not attribute an impermissible purpose to Congress if the result would be to strike down an otherwise valid statute).

"old-timers." It is a plan that benefits all Alaskans, present and future, by preserving and enhancing their resource wealth and by assisting in the development of stable, long term population growth in the state.[13]

III

THE DIVIDEND DISTRIBUTION PLAN DOES NOT PENALIZE THE RIGHT OF INTERSTATE MIGRATION

The right to interstate migration is fundamental to the unity of this nation and cannot be infringed directly or indirectly by any state. *U.S. v. Guest*, 383 U.S. 745 (1966); *Edwards v. California*, 314 U.S. 160 (1941). But it was not until *Shapiro v. Thompson*, 394 U.S. 618 (1969), that this court directly confronted the legal impact of durational residency laws on that fundamental right. In *Shapiro*, the issue was the validity of a series of statutes that barred new migrants to a state from welfare benefits until they had resided there for one year. The court viewed the requirements as creating ". . . two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year

---

[13]Much of appellants' arguments concerning a preference for "old timers" seems to be premised on the fact that the program permits residents to count their years of residence as far back as 1959, the date of statehood. But as the Alaska Supreme Court noted in its opinion below, the selection of 1959 as the year from which dividends could be counted "is not a significant aspect of this statute" in terms of its constitutionality. If, for instance, instead of beginning the program "in medias res," the legislature had provided for dividend accumulation beginning in 1980, a person arriving in the state in 2001 would be in precisely the same position as appellants. As the Alaska Court found, "if the statute were constitutional with residency counted from 1980 as to residents migrating into Alaska in 2001, it is constitutional as to the Zobels here with residency counted from 1959." Williams v. Zobel, 619 P.2d 448, 461 n.37 (Alaska 1980).

or more and the second of residents who have resided less than a year in the jurisdiction." *Shapiro v. Thompson, supra* at 627. Solely on the basis of that distinction, the first class was granted, and the second denied, welfare benefits ". . . upon which may depend the ability of the families to obtain the very means to subsist—food, shelter and other necessities of life." *Id.* at 627. The Court held that a classification of this nature penalized recent migrants to a state and could only be justified by a compelling state interest which in turn the court found lacking.

Shapiro was followed by *Dunn v. Blumstein,* 405 U.S. 330 (1972), where the court held unconstitutional a Tennessee requirement that in order to vote, a person had to be a resident in the State for one year and in the county for three months. The court again focused on the isolation of recent migrants into a penalized class, commenting:

> Durational residency laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right. In the present case, such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote. Absent a compelling state interest, a state may not burden the right to travel in this way.

Dunn v. Blumstein, supra at 342. The principles established in *Shapiro* and *Dunn* have remained undiminished, but they have been clarified somewhat by recent decisions. In *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974), the court struck down as a "penalty" on interstate migration a prior residency requirement of one year for receipt of nonemergency health care. In the Court's words:

> In *Shapiro,* the Court found denial of the basic necessities of life to be a penalty. . . . Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at

> least clear that medical care is as much a basic necessity of life to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic subsistence have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.

Memorial Hospital v. Maricopa County, supra, at 259. The court concluded that:

> . . . the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents.

Id. at 261.

There have been two instances in which this Court has specifically upheld durational residency requirements. Commencing with a memorandum affirmance of a District Court opinion in *Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.,* 401 U.S. 985 (1971), the Court went on to note in *Vlandis v. Kline,* 412 U.S. 441, 452 (1973), that it was permissible for states to require new residents to pay higher tuition at a state university than that paid by longer term residents. And in *Sosna v. Iowa,* 419 U.S. 393 (1975), the Court held that a statute which denied recent migrants to a state access to the courts for divorce did not infringe on the right to travel. In *Sosna,* the Court found a rational basis for the waiting period apart from simple "budgetary or record keeping considerations" which in its view had been the primary justification used by states in prior right to travel cases. Moreover, unlike previous cases where the need for medical or welfare services had been immediate, the Court in *Sosna* found that the plaintiff would not be foreclosed from achieving what she desired, albeit at a later time, providing she com-

lied with what the Court found to be a reasonable waiting period.

This case is fundamentally different from the right to travel cases that have previously come before this Court.[14] Those previous cases share a basic ingredient—the separation of residents of a state into two distinct classes, new migrants and everyone else. In *Shapiro,* for instance, the Court spoke of "two classes of needy resident families undistinguished from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year in the jurisdiction." *Id.* at 627. In *Dunn*, the Court noted that the onus of durational residency laws is that they burden the right to travel "by imposing their prohibitions on *only* those persons who have recently exercised that right." *Id.* at 342 (emphasis supplied). The distinctions made in the Permanent Fund plan, however, are *not* focused at newly arrived residents—they apply equally to all residents of the State. The rights of all residents to an equal annual dividend and the right to accumulate dividends have nothing to do with whether they are recent migrants or not. All residents, those who migrated at any time and those born in the State,[15] are treated exactly the same. And to the

---

[14]Appellants appear to concede these differences in their brief. For instance, on p. 4 of their brief they note that the dividend plan is not merely quantitatively different than durational residency requirements but "qualitatively" different as well. And while on p. 16 of their brief, appellants note that this Court has characterized durational-residency requirements as "waiting periods," they then go on to note at p. 17 that the dividend distribution plan does *not* impose a "waiting period" in the *Shapiro* or *Sosna* sense at all.

[15]The fact that the dividend plan applies with equal impact to persons who were born in Alaska obviously makes it somewhat difficult to characterize the law as one that discriminates against "recent migrants."

extent that the rights of accumulation result in different amounts of money being received by residents in any one year, again it has nothing whatsoever to do with recent migration. A resident who has been in Alaska ten years receives different cumulative dividends than a resident who has been here for twelve years. A six-year resident receives different amounts at any one time than a seven-year resident. These differences must be rationally justified, but it is critical to recognize that newly arrived residents are treated no differently than long term residents in dividend allocations. The legal issue here is not the right to travel. It is simply whether the legislature may establish a dividend distribution program by which all residents of Alaska increase the number of annual dividends they receive as they increase their residence in the state.[16]

Perhaps the most graphic illustration of the uniform application of the dividend distribution method can be shown by appellants' own efforts to characterize themselves as a part of a "suspect class" of "newcomers" to the State. Appellants' Br. at 19-22. In appellants' view, the unarticulated basis of this Court's decisions on right to travel may, in fact, be the existence of such a suspect class and an effort by the Court to protect those new migrants from "class legislation." *See,* McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or Newcomers as a Suspect Class?*, 28 Vand. L. Rev. 987 (1975).

---

[16]An example may tend to clarify the significance of this point. If a law required that all blacks retire from a police force at age 50 there would clearly be a "suspect class" created, and the focus of the Court would be on the basis for that classification rather than the age requirement itself. We have no doubt that such a law would be invalid. But if the law were extended so that *all* persons, regardless of race were required to retire from the police force at 50, the inquiry shifts from the classification to the rationality of the age requirement itself, and the result is different. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

But the basic flaw in this argument (aside from its assumed but unproven premise) is apparent the moment one attempts to describe the "class" in this case. A suspect class is one "saddled with disabilities," one subjected to a history of "purposeful unequal treatment" and one with such "political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School District v. Rodrigues*, 411 U.S. 1, 28 (1973); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). Since the differences in cumulative dividends received under the distribution plan at issue here apply to all residents, and apply uniformly regardless of length of residency, it is difficult to understand what specific "group" is "saddled with disabilities." Is a fifteen year resident of Alaska a part of this class because he receives fewer annual dividends than a twenty year resident? Are appellants (now three year residents) a part of the class because they receive five fewer annual dividends than an eight year resident? Is a one year resident a part of the class because he receives two fewer annual dividends than the appellants? Since appellants will always receive more dividends than some and less than others, are they the beneficiaries or the victims of the "majoritarian political process" they claim to fear?[17]

---

[17]Indeed, it is difficult to determine who the "majority" really is in this analysis. While appellants suggest (through reference to a legislator's comments during debate) that a majority of legislators would receive the maximum amount of dividends under the act, they fail to note that just slightly less than 50% of the legislators would *not* receive the maximum benefit. See *State of Alaska Election Pamphlets*, 1978, 1980 for duration of residence of legislators voting on the bill. Yet, the dividend plan passed the House 35-3 and the Senate 18-0, hardly a rampant display of self aggrandizement. *See*, Alaska House Journal, 2d Session, 11th State Legislature, 965, 966 (1980); Alaska Senate Journal, 2d Session, 11th State Legislature, 754 (1980). Moreover, as shown in Appendix A, applications received by the Department of Revenue

To the extent "class" legislation analysis has any application here, this case is like *Rodrigues* and *Murgia*. In both those cases, allegations were made that because members of what could be a suspect class fell within broader statutory classifications, the broader classifications were in themselves suspect. But the Court rejected those contentions, noting in *Murgia* that while the "elderly" obviously were contained in a requirement for mandatory retirement at age 50, the line had actually been drawn in middle life and had not been aimed at the elderly. In *Rodrigues*, the Court held the fact that certain school districts contained a substantial number of poor people was irrelevant in determining whether the school foundation program attempted to establish classifications based on poverty.

The Permanent Fund dividend program means that "newcomers" will always receive less money than people who have been residents of Alaska longer than they. But that is because *every* resident of Alaska receives fewer total cumulative dividends in any one year than people who

---

for Permanent Fund dividends indicate that over 70% of the applicants are *not* entitled to the maximum benefits, a fact that is hardly surprising in a State whose population has doubled in 20 years. Perhaps of particular interest are two facts: that nearly one third of all applicants have lived in Alaska for less than 5 years; and that only 28% of all applicants are "old timers"; *i.e.*, those who have lived in the State 21 years or more. The "majority" that supported this program consists of Alaskan residents and their legislators of all durations of residency.

Since this case was resolved by summary judgment, there is no factual record concerning who would qualify for Permanent Fund dividends; nor for that matter was evidence available on the point at the time of suit. Since that time, dividend applications were received and have been analyzed by computer. We are making this computer printout available to the Court solely in an effort to demonstrate that the sweeping factual assertions made by appellants, which are totally unsupported by anything in the record, are in addition, totally incorrect.

have been residents longer than they. There is no class, suspect or otherwise, established. The law is uniform.

The appellants seem to confuse their rights to participate in this program with the amount of money they receive at any one time under the program. If, for instance, appellants were recent migrants to Alaska seeking welfare, they would receive under Alaska law the immediate right to participate in the welfare program. But they would not have a right to the maximum amount of money received by *anyone* under the program. If Alaska awarded welfare benefits on the basis of the number of dependent children, and appellants had but one, they would not be able to claim the maximum benefit received by people with a greater number of children—only the right to receive benefits under the same standards applicable to all Alaska residents. Here, the qualification for participation in the dividend program is not need, but the simple status of residency. Alaskans have determined, for specific reasons, to allcoate dividends among residents by a particular formula of annual distribution. Appellants have every right to demand that the formula applicable to all Alaskans also apply to them, without distinction. That is exactly what they have received.

The second major distinction between the dividend distribution system and previous durational residency cases lies in the fact that the dividends distributed have no relation to any individual need of the recipient. In the terminology of past cases in this court, there is no "fundamental necessity of life" involved here however broadly that term may be interpreted. While appellants understandably denigrate the past terminology, it clearly has been at the heart of the Court's decisions. The first holding in *Shapiro* defined a "penalty" on migration to be a denial of "basic, necessities of life." *Maricopa County* reiterated that concept of "penalty" and went on to note that "medical care

is as much a basic necessity of life to an indigent as welfare assistance." *Id.* at 259. The Court went on to comment that "privileges or benefits necessary to basic subsistence are of greater constitutional significance than less essential forms of government entitlements." *Id.* The Court then applied a "compelling" state interest test because in its view, the right to travel guaranteed new residents equal rights to "vital government benefits and privileges" as those held by all other residents of states to which they migrate.

This emphasis on the importance of the benefit seems to be directly tied to the Court's concern with the impact on the constitutional right at issue—the right to migrate from state to state. It is one thing to say that if a law denies to new residents some government benefit necessary to basic sustenance no actual deterrence of migration need be shown to trigger "strict scrutiny." It is another to say that even minimal distinctions between new and old residents of a state raise a federal constitutional issue. The judicial concern has been to insure that rights of migration necessary to accomplish national union be free of state interference. That in turn has resulted in an emphasis on important human needs—the so called "basic necessities of life."

Appellants seek to avoid the present lack of relationship between dividends and personal need by raising a spectre of future action by the State by which all social programs based on need would be abolished and replaced by increased dividends based on residency. The accuracy of this prediction can perhaps be measured by the fact that social programs based on need have substantially increased in Alaska since the Permanent Fund plan was adopted.[18]

[18]See Appendix B where budgetary appropriations for social welfare programs before and after the creation of the dividend plan are compared.

There is no reason to assume that the legislature will suddenly reverse its historically generous attitude toward the destitute in the future. Moreover, a graduated welfare distribution plan tied to residency would not only be obviously unconstitutional—it would be incredibly inefficient and totally inadequate to address the interests of the needy. Under what conceivable theory would the legislature want to give large amounts of money to only slightly needy people who had lived in Alaska perhaps twenty years while denying necessary amounts to other people with much greater need who had not been in the state for that period?

What is perhaps remotely conceivable, though highly unlikely, is that if the population of Alaska did not increase substantially and enormous new finds of oil created greater and greater dividends, the legislature might decide someday that even the lowest surplus dividend payments were more than sufficient to provide the maximum amounts necessary for any form of public assistance, and that therefore, no such assistance programs were necessary in the future.[19] In that case, since all residents of any duration would receive an amount equal to what they would receive under any public assistance program plus in many cases, additional payments, we fail to see how this unlikely occurrence would violate the Constitution.

The final distinction between this and previous durational residency cases lies in the overall impact of the plan. The permanent fund dividend plan distributes sur-

---

[19]The improbability of this occurrence is emphasized by the fact that the Free Conference Committee which wrote the final version of this bill specifically clarified the fact that dividends received would *not* be considered income for the purpose of determining whether individuals qualified for welfare assistance based on maximum income levels. (R. 217.)

plus oil revenues to residents using a distribution method that is designed to achieve long range goals—to insure that benefits accrue not only to present-day residents of Alaska, but to residents who have not yet come to the State. Each new resident receives exactly the same rights of accumulation as those who have come before. If he remains a resident for the same amount of time as another resident, he will receive the same amount of accumulated dividends. If a new resident does not reside in Alaska as long as another, he will receive less in the aggregate. But that will be the case whatever system of distribution is utilized. Even under the per capita system urged by appellants, a ten year resident over the period of his residency will receive half as much as a twenty year resident and ten times as much as a one year resident. This disparity results from the fact that participation in the program arises simply from being a resident, which in turn gives rise to an interest in the resources. Under the cumulative system adopted by the Legislature, the difference between the amount a new resident will receive initially and the total amount already received by a resident who arrived earlier is greater than it would be under a per capita system. But if the new resident lives in Alaska for the same total number of years as one who arrived earlier, the new resident makes up the initial difference in exactly the same period of time as he would under a per capita system, because he accumulates dividends at a higher rate. Under the cumulative system, equality is achieved in the aggregate, just as it would be under a per capita system.

The concept of equality in the aggregate would, of course, be meaningless if applied to the type of government programs at issue in *Shapiro* and *Maricopa County*. It makes no sense in the area of medical care to suggest that though someone does not qualify today because he

has not lived in the State long enough, he will qualify for similar medical care at a later time. If someone is sick, he needs care today—what will happen later is irrelevant. The purpose of medical care, welfare or similar programs is to deal with present individual need. For those programs the appropriate basis of comparison to determine whether similarly situated persons are treated equally is obviously the similarity of the needs of both long term and newly arrived residents at the time those needs exist, and not the similarity of aggregate benefits that each may ultimately receive under the program. But the permanent fund dividend plan is of a different nature. It is not based on need, "fundamental" or otherwise.[20] It is, instead, a program based purely on the status of residency—a long-term plan to distribute resource wealth in a manner consistent with certain basic policy objectives—primary among them being a wise and cautious approach to the management and development of Alaska's resources so

---

[20]It is certainly true that many residents, particularly Alaska Natives living in outlying communities and maintaining a limited subsistence lifestyle, were counting on using their dividends to enhance their cash incomes during the winter months. See, Affidavit of Thomas K. Williams, at p. 5, Appellees' Opposition to Stay. But any "need" felt by those residents was a result of having planned to receive their dividends and of having structured those dividends into their financial plans. The purpose of the dividend distribution is not aimed at relieving economic hardship or providing economic advantage. Programs for that purpose remain unaffected by dividend payments under State law. Obviously, there is wide variance in the personal economic situations of individual Alaskans, and each resident will use his dividends in accordance with his own particular individual needs and desires, whatever they may be. As appellants suggest, the dividends may be used for "food, shelter, clothing, medical care, or fuel." They may also be used for vacations, a new car, purchase of stock, or anything else.

that this generation of residents will not be the only group to benefit from them. And since this is a distribution program with long term objectives unrelated to present need, it is entirely appropriate to compare its impact on residents over the long term.

The Alaska dividend plan does not involve the denial of any government services to anyone. Unlike medical benefits (*Maricopa County*) welfare (*Shapiro*), the right to vote (*Dunn*), or even the right to obtain a divorce (*Sosna*) all of which were withheld from recent migrants in right to travel cases, nothing at all is "prohibited" here. Prospective migrants need not "choose" as they consider a move to Alaska. *Dunn v. Blumstein, supra*, at 342. The only question is what additional benefits they will *gain*—the precise amount of a unique annual dividend bestowed only upon those who live in Alaska. There is no penalty imposed on those citizens of other states who exercise their right of interstate migration.

IV

THE DIVIDEND PLAN DOES NOT INFRINGE ON ANY FEDERALLY GUARANTEED RIGHT OF STATE OR NATIONAL CITIZENSHIP

The 14th Amendment to the U.S. Constitution contains a clear federal guarantee of the right of any United States citizen to become a citizen of any state in the Union. Appellants assert this federal guarantee is a substantive right here—one which in their view voids the classification utilized in the dividend plan. Totally apart from any alleged "penalty" on the right to travel, appellants argue that the "federal component" of state citizenship bars a state from making any classifications based on when a state citizen in fact became a citizen. As appellants put it, "the State has no legitimate interest in so distinguishing between persons whose right of State citizenship is

anchored in the Fourteenth Amendment." Appellants' Br. at 32.

The primary authorities offered for this conclusion are *Shapiro, Dunn*, and *Maricopa County*, cases which are premised on the right to travel and place no reliance on a federally guaranteed substantive right of State citizenship. And, of course, conspicuously absent from appellants' argument is any mention of cases like *Starns, Vlandis*, and *Sosna* which have specifically approved certain classifications based on length of residency, to say nothing of the dictum in *Shapiro* and *Maricopa County* which indicates that certain distinctions based on when a citizen becomes a resident would be valid—a somewhat inappropriate notion if *all* such requirements violated federally guaranteed rights of state citizenship.

The basic failure in appellants' argument is that they fail to identify the "substantive" rights of citizenship on which they rely. But there are such rights delineated in the Constitution. In Article IV, for instance, it is stated that the "citizens of each state shall be entitled to all privileges and immunities of citizenship of the several states." The 14th Amendment similarly provides that States may not abridge "the privileges and immunities of citizens of the United States." These, in fact are "substantive" rights of State citizenship, which are guaranteed by the Federal Constitution, and they have received regular review by this Court.

Corfield v. Coryell, 6 F. Cas. 546, 552 (E.D. Pa. 1825), laid out the early parameters of "privileges and immunities" in terms that have survived until today. In upholding a New Jersey law restricting access to oyster beds to state residents, Justice Washington, sitting as a Circuit Justice, enunciated the privileges and immunities of citizenships in limited terms. In his view, States were forbidden to

interfere with "the right of any citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take hold and dispose of property, either real or personal." *Id.* at 552.

Blake v. McClung, 172 U.S. 239 (1898), contains one of the clearest statements of the fundamental nature of the privileges and immunities of citizenship. In striking down a Tennessee statute which gave preference to state residents in the distribution of certain corporate assets, the Court went on to note:

> We must not be understood as saying that a citizen of one state is entitled to engaging in another state *every* privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people in which citizens of other states may not participate except in conformity to such reasonable regulations as may be established by the State . . . [citing examples]. The constitution forbids only such legislation affecting citizens of the respective states as will *substantially* or *practically* put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the people of the United States, by and for whom the government of the Union was ordained and established.

Id. at 256-57 (emphasis supplied).

Only three years ago, in *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978), the Court reiterated the *Coryell* doctrine, summarizing it in these terms:

> In his opinion in *Coryell*, Mr. Justice Washington, although he seemingly relied on notions of "natural rights" when he considered the reach of the Privileges and Immunities Clause, included in his list of situations, in which he believed the States would be obligated to treat each other's residents equally, only those where a nonresident sought to engage in an essential activity or exercise a basic right. He himself used the term "fundamental," 6 F. Cas., at 551, in the modern as well as the "natural right" sense. . . . With respect to such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union, the State must treat residents and nonresidents without unnecessary distinctions.

Id. at 387.

In *Baldwin*, the Court then went on to pose the question, "Does the distinction made by Montana between residents and non-residents in establishing access to elk hunting threaten a basic right in a way that offends the Privileges and Immunities Clause?" *Id.* at 388. Having answered the question in the negative, the Court upheld the plan, rejecting in addition an equal protection challenge based not on "substantive" rights but on allegedly discriminatory classifications.

The striking aspect of even this brief review of privileges and immunities cases is that the analysis in those cases is so similar to the Court's analysis in right to travel cases. Privileges and immunities—the substantive rights guaranteed to all state and United States citizens are those rights which are "basic and essential" or "fundamental" —rights which if denied would "frustrate the purposes of the formation of the Union." *Baldwin, supra,* at 387. The right of migration, also a right guaranteed to all state and national citizens, is only violated when states penalize

the right by denying "basic necessities of life" (*Shapiro*); strict scrutiny is applied because government benefits "necessary to basic sustenance" are involved (*Maricopa*). The analogy is not coincidental. It represents a considered judgment by this Court manifested by nearly 200 years of consistent interpretation, that those individual rights guaranteed in our national constitution should be restricted to those which are fundamental to the maintenance of the Union itself.[21] Beyond those basic rights which guarantee the unity of the nation, individual states are free to make judgments for themselves as to appropriate public policy. They must of course conform to basic concepts of rationality—laws which make distinctions between persons must not be arbitary. But "strict scrutiny" and prohibitions imposed by federally guaranteed citizenship are limited to the most fundamental types of rights.

Nothing in the Alaska dividend plan infringes upon "fundamental" rights of any kind. There is no threat here to those doctrines of federal constitutional law that bind us together as a nation. There are, of course, distinctions made in the act, and like any distinctions, those between residents must be rationally related to valid legislative

---

[21]This general principle extends to other portions of the 14th Amendment. Aside from privileges and immunities and equal protection, both of which are discussed in this brief, the Court has also held that the due process clause of the 14th Amendment is violated only when a state procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). *See also*, Patterson v. New York, 432 U.S. 197, 202 (1977); Speiser v. Randall, 357 U.S. 513, 523 (1958); Leland v. Oregon, 343 U.S. 790, 798 (1952). It will be invoked only where a "compelling" interest or right of a "fundamental character" is at issue; Powell v. Alabama, 287 U.S. 45, 67-68 (1932); and only where "important interests" are at stake. Frank v. Maryland, 359 U.S. 360, 367 (1958).

goals. But since this plan does not penalize or interfere with a separate federal constitutional right, it is neither prohibited outright, nor is it required to be justified by a "compelling" state interest. It is only necessary that the plan be rational.

V

THE PURPOSES OF THE PERMANENT FUND DIVIDEND PLAN ARE VALID, AND THOSE PURPOSES ARE RATIONALLY RELATED TO THE PARTICULAR MEANS CHOSEN TO EFFECT THEM

This Court has consistently held that when an economic measure[22] is challenged *solely* on equal protection grounds, the Constitution requires "only that the classification challenged be rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). *See also, Minnesota v. Clover Leaf Creamery Co.*, 49 U.S.L.W. 411 (U.S. Jan. 21, 1981); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Indeed, in any equal protection challenge where substantial individual interests are not affected, the rational basis standard is appropriate.[23] *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371, 391 (1978); *United States Railroad Retirement Board v. Fritz*, 49 U.S.L.W. 4035 (U.S. Dec. 9, 1980).

We have already described in some detail the circumstances leading up to the enactment of the dividend program and the concerns that prompted selection of the distribution method challenged by appellants. It was certainly reasonable for the legislature to have concluded that resi-

---

[22]Management of the assets of the Permanent Fund is obviously a matter of economic concern. But even the mineral resources of the State are ultimately of economic concern, for the oil and gas have no value to the State unless they can be marketed.

[23]The insubstantiality of the individual interests asserted by appellants is discussed in detail below, at 40-41.

dents would be more likely to have a continuing interest in prudent management policies for the Permanent Fund and for mineral resource development in future years if they were provided with a direct personal interest that would itself be promoted by continuing those management policies. This distribution method encourages all residents in a very direct way to be more concerned about those long term management policies than about immediate benefits. It was also reasonable for the legislature to have concluded that residents of Alaska would be reluctant to sever their ties with the State if it meant losing entitlement not just to next year's dividends, but also to the dividends in future years, which by then will have accumulated in ever increasing number. The program clearly provides an incentive for residents to maintain their residency, and it is reasonably calculated to help achieve a more stable population.[24]

It may be that the legislature could have found other ways to accomplish these purposes. Appellants suggest, for example, that the legislature could promote a stable population by improving public services and by creating economic opportunities. Appellants fail to point out, of course, that the legislature is already pursuing these means in addition to the dividend program, but even if it were not, this Court has consistently held that a State is not required

---

[24]Appellants totally misunderstand how this feature of the plan would operate in practice. For instance, appellants question why the State would want to provide an incentive to people, who, through their length of residency, have already demonstrated their commitment to the State. (Appellants' Brief at 41). But as we are sure appellants are aware, a substantial number of persons who have lived in the State since Statehood are young people who, as they approach majority, must reach a decision as to whether to stay in Alaska or to leave. Their only present commitment to the State is through their parents—this plan provides a personal incentive for them to remain in Alaska.

to solve its problems all at once by every available means. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955). And, of course, the availability of "less restrictive alternatives" is not even relevant where there is no burden imposed on an independent Constitutional right and no suspect classification involved in challenged legislation.[25] Where rationality is the test, it is irrelevant that other, perhaps even better, means might have been chosen. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

In a similar vein, Appellants argue that the purpose of encouraging prudent management of the Permanent Fund would be equally well served by a per capita system of distribution. A per capita distribution was in fact considered and ultimately rejected in favor of this program, because the legislature had sufficient reasons to believe that a per capita system would actually undercut the desired goals. But whether the legislature was right or wrong in its judgment is not the issue here, for as this Court stated in *New Orleans v. Dukes, supra*, ". . . the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations that neither affect fundamental rights nor proceed along suspect lines . . . ." *Id.* at 303 (citation omitted).

---

[25]The availability of "less restrictive alternatives" is most often at issue in cases involving a denial of privileges and immunities or discrimination against interstate commerce. No doubt this explains appellants' reliance on Dean Milk Co. v. Madison, 340 U.S. 349 (1951). There is, of course, no Commerce Clause question at issue in this case. When strict scrutiny is required under the Equal Protection Clause, a classification must be *necessary* to promote a *compelling* state interest, and the availability of alternative means may be relevant to the issues both of necessity and the compelling nature of the State interest. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 637 (1969).

Appellants have not challenged the validity of encouraging prudent management of the Permanent Fund and of the State's natural resources. Instead, they argue that this purpose simply reflects a "concern over protection of the public fisc," a concern they claim is insufficient to justify the dividend program. Their reliance on *Rivera v. Dunn*, 329 F.Supp. 554 (D. Conn. 1971), *aff'd mem.*, 404 U.S. 1054 (1972) and *Maricopa County*, however, is misplaced. In both of these cases, one year residency requirements for welfare and medical benefits for the poor were found to impose a penalty on the fundamental right of interstate migration, and thus the requirements could be upheld only upon a showing of a *compelling* state interest. The dividend program imposes no penalty on that or any other right, and the State's purposes need not be "compelling." More important, the interests of Alaska in the long-term management of its Permanent Fund and of its natural resources are of considerably greater magnitude than a simple desire to save money on a program such as welfare or medical care for the poor. These interests are certainly of sufficient weight to sustain the rationality of the program. *See, Baldwin, supra,* 338-91.

Appellants further contend that Alaska's efforts to encourage prudent management of the Permanent Fund and its mineral resources cannot provide justification for "an otherwise impermissible classification." Appellants' Br. at 42. The major difficulty with appellants' argument is that they fail to identify the group that is "impermissibly" classified. In this case there is no basis for concluding that any one class of residents is being motivated by advantageous treatment to support a program at the expense of any other class of residents. The vast majority of residents applying for dividends for 1979 fell into what appellants have characterized as the "disadvantaged class"—those who were entitled to less than the maximum possible number of

dividends. This so-called disadvantaged class contains more than sufficient numbers to protect its interests in the political arena.[26] Thus, this case does not involve "otherwise invidious discrimination," directed at those who have insufficient political power to protect themselves from majority interests.

Further, the arguments concerning "political support" that were rejected in *Maricopa County, Baldwin,* and *Cole v. Housing Authority of Newport*[27] were based entirely on an attribution to voters of purposes and motives that a state could not itself directly pursue. In *Maricopa County* and in *Cole,* for example, durational residency requirements were argued to be necessary because voters would not support public medical care or public housing programs unless the programs were structured in such a way that indigents would be discouraged from migrating into their communities. A state could not directly pursue such a purpose. *Edwards v. California,* 314 U.S. 160 (1941). Similarly, the argument was made in *Shapiro* that Congress had authorized states to impose waiting periods for welfare benefits. The Court answered this argument in part by posing and then rejecting the following hypothetical:

> Perhaps Congress could ensure wider participation in school construction if it authorized the use of joint funds for the building of segregated schools. . . . Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the states to violate the Equal Protection Clause.

Id. at 641. Since neither Congress nor the states may pursue a policy of racially segregated schools, Congress may not do so indirectly by assuming that states will build

---

[26] *See,* Appendix A.

[27] 435 F.2d 807 (1st Cir. 1970).

more schools if the voters in those states knew the schools would be segregated. But Alaska here is not attempting to motivate its citizens to do anything that the State could not itself do directly—encourage a positive interest by all residents in the prudent management of the Permanent Fund and the State's mineral resources.

Faced with an obviously rational basis for the dividend plan, appellants alternatively suggest that this Court not apply the rational basis test at all—— that it should instead subject the dividend program to an "intermediate" level of scrutiny—one more stringent than the rational basis test. The concept of a level of judicial scrutiny in equal protection cases that "bridges the gap" between the rational basis test and the compelling state interest test is not new.[28] There is, however, no apparent unanimity about what should be involved in an intermediate level of scrutiny and under what circumstances it should be applied.[29]

In some cases intermediate review or "intensified" scrutiny has meant that a classification must have more

[28]Interestingly enough, intensified scrutiny is *required* for equal protection purposes in all cases under the Alaska Constitution. Under the Alaska Constitution, a classification must not only bear a fair and substantial relationship to legitimate state purposes, but when substantial, but less than fundamental, individual interests are affected, the state's interests must outweigh the individual interests. A more stringent "fair and substantial relationship" test for Alaska was announced in Isakson v. Rickey, 550 P.2d 359 (Alaska 1976). Two years later the Alaska Supreme Court also adopted the balancing approach. State v. Erickson, 574 P.2d 1 (Alaska 1978). Both elements of intensified scrutiny were applied by the Alaska Court to the dividend program.

[29]*Compare*, G. Gunther, The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine On A Changing Court: A Model for a New Equal Protection, 86 Harv.L.Rev. 1 (1972); *with* L. Tribe, American Constitutional Law § 16-31 at 1089-92 (1978); and *see*, United States Railroad Retirement Board v. Fritz, 49 U.S.L.W. 4035, 4038 n.10 (U.S. Dec. 9, 1980).

than a rational relationship to *some* governmental purpose —the governmental purpose must itself be of some importance, and it must outweigh the importance of the individuals' interests that are affected. Thus, in *Sosna*, "purely budgetary considerations or administrative convenience" would apparently not have been sufficiently weighty to justify denying a new resident access to the divorce courts for a one-year period. *Id.* at 405. Iowa's interests in the adjudication of marital disputes in its state courts, however, were presumably of greater magnitude, and were sufficient. In other cases intensified scrutiny has meant that the Court will be less tolerant of classifications that are either over-inclusive or under-inclusive. *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976).

A fundamental ingredient of intermediate scrutiny analysis is the identification and evaluation of the individual interests involved. It is not entirely clear, however, what individual interests are being asserted by appellants, apart from their arguments concerning the right to travel and the existence of a suspect classification. As we have discussed above, this program does not penalize the right to travel in any way, and it does not infringe on any other federally recognized right of state or national citizenship. Appellants also make an oblique reference to the "right that each citizen has to publicly owned natural resources in the property law sense." Appellants' Br. at 27. But even if citizens have a right "in the property law sense" to the State's lands and mineral resources, they clearly do not "own" the money in the State treasury in that sense. If they did, a state could never establish programs that did not provide exactly equal benefits, or build roads or public facilities that were not equally used by all residents. It could only take in revenues and annually distribute them on a per capita basis to its citizens.

The State is not distributing its lands or its mineral resources under this program. It is distributing a portion of the earnings from the Permanent Fund—earnings that would be deposited in the general fund of the State and available for general appropriation if they were not distributed as dividends. Appellants simply do not have a right to receive equal amounts with all other residents under every State program that distributes monetary benefits. A state may distribute unequal amounts to its citizens so long as the distinctions are rationally based. Appellants' asserted interest in "equality" is adequately protected by the requirements of the rational basis test, and this interest does not warrant special balancing.[30] In fact, the only individual interest actually affected here is how much money will be received under a program that provides a supplement to personal income that is totally unrelated to need.[31]

---

[30]This case, in terms of the individual interests at stake, much more closely resembles the cases in which this Court has *not* balanced individual interests against governmental interests and has *not* required distinctions to be drawn with great precision. For example, in Baldwin v. Montana Fish & Game Commission, 436 U.S. 371 (1978) the Court applied the rational basis test when reviewing the equal protection challenge to Montana's non-resident hunting license fees. There the interest at stake was reduced license fees for recreational hunting, even though residency formed the only basis for the distinction. *See also,* U.S. Railroad Retirement Board v. Fritz, 49 U.S.L.W. 4035 (U.S. Dec. 9, 1980) (denial of "windfall" retirement benefits); Schweiker v. Wilson, 49 U.S.L.W. 4207 (U.S. March 23, 1981) (denial of supplemental "comfort money" under Social Security Act); and Califano v. Torres, 435 U.S. 1 (1978) (denial of enhanced supplemental Social Security benefits).

[31]In past decisions of this Court, which at least one commentator has identified as employing an intensified level of scrutiny, the individual interests, by contrast were substantial. *See, e.g., Stanley v. Illinois,* 405 U.S. 645 (1972) (A father's interest in retaining

The State's interests, by contrast, are significant. We have already reviewed the circumstances leading up to the establishment of the Permanent Fund. That review illustrates the important role the Permanent Fund is expected to play in Alaska's future. Difficult choices face the people of Alaska and their elected representatives over the next few decades—choices that will affect the quality of life in Alaska for generations to come.[32] As we have shown, the dividend program is closely tied to the purposes of the Permanent Fund, and the program is designed to encourage Alaskans to make responsible choices during the critical years in which oil revenues are still available and flowing into the Permanent Fund. As the Alaska Court found, the interests of the State in this program are the result of the convergence of a number of important concerns:

> administering and husbanding Alaska's new-found wealth, avoiding the 'cost-free' expansion of government, coping with an acute population turnover problem, and containing and counterbalancing the push for immediate development of Alaska's resources. . . .

Williams v. Zobel, 619 P.2d 448, 463 (Alaska 1980). The Alaska Court correctly concluded that the State's inter-

---

custody of his biological children) and *Cleveland Bd. of Educ., v. La Fleur*, 414 U.S. 632 (1974) (A woman's decision to bear a child), cited in L. Tribe, American Constitutional Law, § 16-31 at 1090, n. 1.

[32]No doubt some states might view Alaska's situation as purely good fortune and would gladly exchange their problems for Alaska's. But this view is a superficial one. When one considers the limited duration of Alaska's oil wealth, it becomes clear that Alaska's problems are much more serious and complex than simply finding ways to spend money.

ests outweigh appellants' individual interests,[23] and that the method of dividend distribution under this program "substantially furthers" legitimate State goals.

Finally, appellants have argued that this program would "truly revolutionize the relationship between a state and its citizenry." Appellant's Br. at 11. They predict that a "State could as easily issue fishing licenses which entitle the bearer to take one fish for every year that he had lived in the State, ration the use of public lands based on durational residency or reserve the finest schools for the children of long-term residents." *Id.* at 12. Appellants argue in effect that upholding the constitutionality of the dividend program will automatically validate any other state program that employs a similar method of accumulated benefits. Their fears are greatly exaggerated and their concerns unwarranted. If the Court upholds Alaska's Permanent Fund dividend program it will mean only that this unique plan is rationally related to legitimate state goals. Whether a state may employ similar methods of accumulated benefits for other programs would depend on whether the state could show that legitimate governmental interests were furthered by that type of accumulated distribution

---

[23]Appellants have also argued that there are "federalism" interests that must go into the balance, and that the Alaska Court failed to take these interests adequately into account. The only "federalism" interest that appellants advanced before the Alaska Court was the right of interstate migration. The Alaska Court carefully reviewed the impact that this program has on the right to travel and concluded that there was no impact of any substance, and non conceivable penalty. Appellants now assert for the first time a "federalism" interest in equality of state citizenship. But as we have previously noted, this interest is protected in part by reference to privileges and immunities requirements, which have no application here, and in part by reference to the Equal Protection clause, which requires in the circumstances of this case, only that there be a rational basis for the distribution program.

method. If substantial individual interests were affected in such a program (which they are not here), the constitutionality of the program would further depend on the importance of the state interests sought to be promoted.

A state program challenged on equal protection grounds must be judged on its own merits to determine the rationality of the choices made by the state. While it might be possible, for instance, to postulate some conceivable set of circumstances that would form a rational basis for a program providing for annually increasing "bag limits" for recreational fishing based on length of residency,[34] it is difficult to imagine any circumstances that would rationally lead a legislature to ration public lands use on an accumulated basis or to shift Alaska's children from year to year to increasingly better schools. Upholding the constitutionality of this dividend program will not pave the way for judicial approval of a host of irrational state programs, in part because of the unique circumstances that led to the establishment of this program, but primarily because any other

---

[34]Without suggesting the outcome of such a controversy, we note that the Court has recognized vast differences between sport and commercial use of fish and game in the past. For instance, while a state may charge disproportionate license fees between nonresidents and residents for recreational hunting; Baldwin v. Montana Fish & Game Comm'n., *supra*; it may not do so for commercial fishing. Toomer v. Witsell, 334 U.S. 385 (1948). Moreover, if a state may charge a new resident a higher license fee to take a uniform bag limit of sport fish, would it really be a federal constitutional issue if, the same state did away with license fee differentials but allowed residents to gradually increase their bag limit as they lived in the State? We doubt any legislature would take this course, but we equally doubt that the issue of whether a resident might take 3 or 5 trout in any one day is a matter affecting "national unity"—one which would approach constitutional dimensions.

state program that purported to be similar must itself rest on independent rational grounds.

The relationship between a state and its citizens is, of course, generally not a matter of federal law at all. It is a relationship defined by the constitution of each state and the political processes which take place in each state. The application of federal law to a definition of the "relationship" is limited. The federal Constitution rigorously protects those "fundamental" rights that are necessary to achieve national union—the privileges and immunities of citizenship, the rights of migration, the right to engage in free commerce to name a few, but beyond these fundamental rights, federal law only requires that states treat their citizens in a non-arbitrary fashion. Laws which distinguish between citizens of a state are valid so long as they rest "on some ground of difference having a fair and substantial relationship to the object of the legislation." *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920).

In this case, the residents of Alaska acting through their legislators have chosen to distribute dividends in a way that they believe will best further the interests of the State. No national interest is involved—no significant individual interest is affected. The citizens of the State may or may not be right in their judgment, but they have the right under our federal system to make the judgment. Appellants are citizens of the State and they are subject to the collective will of the majority of people of the State. That is the basic "relationship" between a citizen and a state, and it is not threatened here.

CONCLUSION

Many years ago, Justice Brandeis commented that:

> " . . . one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The dividend distribution plan is just such an experiment. Its purposes have nothing to do with favoring the interests of old time Alaskans over the interests of new residents of the State. In contrast, this plan is one under which all Alaskans may benefit, now and long into the future. All share the same rights and all, in the end, benefit equally. The particular method of distributing permanent fund income selected by the Alaska legislature may not entirely solve the problems that we have discussed here. But the method of distribution is "fairly and substantially" linked to a solution of those problems. That is all that the Constitution requires. The decision of the Alaska Supreme Court in this case should be affirmed.

Respectfully submitted,

WILSON L. CONDON
Attorney General
SUSAN A. BURKE
COUNSEL OF RECORD
Assistant Attorney General
AVRUM M. GROSS
Special Counsel to the Attorney General
Counsel for Appellees

(Appendix follows)

Appendix A

Memorandum

State of Alaska

Date: April 23, 1981

To: Wilson L. Condon
Attorney General

From: Thomas K. Williams
Commissioner
Department of Revenue

Subject: Permanent Fund Dividend Statistics

Dear General Condon:

Attached, as you requested, are the preliminary computer printouts showing the number of persons who applied for permanent fund dividends in 1980, and a breakdown of the length of residency of the various applicants. There were a total number of 235,717 persons who applied for the dividends out of a state population of approximately 400,000. The discrepancy of course is due in large part to the fact that dividends are only payable to persons 18 years or older.

Department of Revenue, Research Section
Permanent Fund Share Description

Table 08
Applicants and Shares
By Resident Years Since Statehood

Resident Group	Number of Applicants	Group Shares	% Apps* of Total	% Shrs* of Total	Avg Shrs Per App
0 Part Year 1979**	6,739	3,446	2.9	0.1	0.51
1 Years Since 1959	9,885	9,894	4.2	0.4	1.00
2 Years Since 1959	11,884	23,558	5.0	0.8	1.98
3 Years Since 1959	12,933	38,400	5.5	1.4	2.97
4 Years Since 1959	14,584	57,821	6.2	2.0	3.96
5 Years Since 1959	12,200	60,520	5.2	2.1	4.96
6 Years Since 1959	8,726	51,803	3.7	1.8	5.94
7 Years Since 1959	7,900	54,749	3.4	1.9	6.93
8 Years Since 1959	7,379	58,316	3.1	2.1	7.90
9 Years Since 1959	8,383	74,792	3.6	2.6	8.92
10 Years Since 1959	8,325	82,476	3.5	2.9	9.91
11 Years Since 1959	6,880	75,019	2.9	2.6	10.90
12 Years Since 1959	6,498	77,277	2.8	2.7	11.89
13 Years Since 1959	5,217	67,166	2.2	2.4	12.87
14 Years Since 1959	5,525	76,546	2.3	2.7	13.85
15 Years Since 1959	5,135	76,138	2.2	2.7	14.83
16 Years Since 1959	4,570	72,146	1.9	2.5	15.79
17 Years Since 1959	4,430	74,122	1.9	2.6	16.73
18 Years Since 1959	7,434	132,958	3.2	4.7	17.77
19 Years Since 1959	7,479	140,360	3.2	4.9	18.77
20 Years Since 1959	7,716	151,380	3.3	5.3	19.62
21 Years Since 1959	65,845	1,382,745	27.9	48.7	21.00
Total Applicants	235,717	2,841,633	100.0%	100.0%	12.06

*Group percentages and shares may not add to 100% or total due to rounding.

**This includes those applicants who lived in Alaska part of 1979 only. If an applicant lived part of 1979 in Alaska and claimed prior full years, s/he is classed with those with the same number of full years of Alaskan residency.

Appendix B

Memorandum
State of Alaska

Date: April 21, 1981

To: Ronald D. Lehr, Director
Division of Budget & Management
Office of the Governor

From: Bob Rehfeld, Budget Analyst
Division of Budget & Management
Office of the Governor

You have asked for information pertaining to the level of Social Services activities as a result of creation of the Alaska Permanent Fund Dividend Program (PFD). My analysis is limited to Assistance Payments, certain subsidy programs and the Alaska Pioneers Programs. As will be observed, it does not appear any correlation exists between passage of the PFD legislation and reductions in Social Services Programs.

Pioneers Homes

1. A new Pioneers Home in Ketchikan is scheduled for completion in December, 1981. Operating costs are included in the Governor's FY 82 budget.

2. The Nursing Wing at the Anchorage Pioneers Home is scheduled for completion in April, 1982. Operating costs are also budgeted for in the Governor's FY 82 budget.

3. Monthly rates for Pioneers Home residents are $225.00 for ambulatory residents and $275.00 for skilled nursing residents. The total of receipts collected in FY 80 was 1.3 million. Being a heavily subsidized program, this amount is equal to only 12% of the total operating costs of the Pioneers Homes.

Longevity Bonus

1. Longevity Bonuses were increased $25 to $200 by the Legislature in 1980.

2. Pending Legislation this year would:
   a. increase the Bonus amount to $250
   b. provide longevity bonus and Pioneer Home benefits to all residents of Alaska 65 years and older.

Assistance Payments

1. Aid to Families with Dependent Children (AFDC)—Passage of SCSCSHB 986 (AS 47.25.300) in 1980 provided both a $50.00 payment increase for recipients and a provision which ties annual cost of living increases to rates used in calculating yearly Social Security Benefit increases. These two changes resulted in an average $57.00 increase to all AFDC recipients on January 1, 1981.

2. Proposed Legislation affecting AFDC would provide an average $25.00 monthly increase for dependent children living with a non-needy relative.

3. Aid to Blind, Disabled, and Old Age Assistance Payments—Statutory changes in 1980 tie yearly benefit increases to the cost of living increases used in determining Federal Social Security benefit levels.

4. Proposed Legislation would increase the General Relief maximum allowable monthly payment from $80.00 to $160.00 and effectively doubling this program's yearly allocation.

Senior Citizen Property Tax Exemptions

1. Chapter 124, SLA 1980, doubled the Tax Equivalency Payments to Senior Citizens whose monthly rent is subject to municipal property tax.

Child Assistance Programs

1. Day Care—An $800,000 increment increase is included in the Governor's FY 82 budget to increase the maximum day care subsidy from $12.00 to $16.00 a day.

Senior Citizen Housing

1. In recent Legislative action, the House approved a 15 million dollar special appropriation to provide planning and construction funds for Senior Citizen housing projects.

Memorandum
State of Alaska
Date: April 22, 1981
To: Ronald D. Lehr, Director
Division of Budget & Management
Office of the Governor
From: Rebecca Burch, Budget Analyst
Division of Budget & Management
Office of the Governor
Subject: Medicaid and GR Medical
FY 80 - FY 82 Outlays and Language Changes

Medicaid

FY 80 Actual	Fed	Gen. Fund	Other
30,997.8	16,649.9	4,969.1	9,378.8
FY 81 Authorization			
45,698.1	26,568.3	16,779.8	2,350.0
FY 82 Governors Operating Budget			
48,388.8	25,940.7	22.448.1	-0-

General Relief Medical

FY 80 Actual	Fed	Gen. Fund	Other
9,513.3		9,513.3	
FY 81 Authorization			
12,168.3		12,168.3	
FY 82 Governors Operating Budget			
14,133.5		14,133.5	

Notes:

1. Language in the FY 81 Authorization Bill Chapter 120 indicating that "If the Federal Revenue Sharing Funds Appropriated for Medicaid fall short of the estimate the Amount of the shortfall is appropriated from the General Fund."

2. Progressively more funding is budgeted for Medicaid and GRM each year from 80-82.

3. Additional Capital Funding has been added to improve payment processing and more eligibility workers have been requested for the Public Assistance program to provide a more timely public service.

Office - Supreme Court, U.S.
FILED
SEP 21 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1146

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

RONALD M. ZOBEL and PATRICIA L. ZOBEL,

Appellants,

v.

THOMAS WILLIAMS, Commissioner of Revenue, and STATE OF ALASKA,

Appellees.

ON APPEAL FROM THE SUPREME COURT FOR THE STATE OF ALASKA

REPLY BRIEF OF APPELLANTS

MARK A. SANDBERG
CAMAROT, SANDBERG & HUNTER
310 "K" Street, Suite 408
Anchorage, Alaska 99501
Counsel for Appellants.

JONATHON B. CHASE
UNIVERSITY OF COLORADO
School of Law
Boulder, Colorado 80309

RONALD M. ZOBEL
PATRICIA L. ZOBEL
On The Brief

September, 1981

Anchorage, Alaska • Ken Wray's Print Shop, Inc. • (907) 276-4535

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 1
ARGUMENT IN REPLY 2

TABLE OF AUTHORITIES

Cases: *Page*

Bradwell v. The State, 83 U.S. (16 Wall.) 130 (1873) 7
Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) 3, 4
Dunn v. Blumstein, 405 U.S. 330 (1972) 3, 7
Edwards v. California, 314 U.S. 160 (1941) 3, 4, 5
Jones v. Helms, U.S. , 101 S. Ct. 2434 (1981) 3
Mathews v. Eldridge, 424 U.S. 319 (1976) 2
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 2, 3, 6
Oregon v. Mitchell, 400 U.S. 112 (1970) 5
Plessy v. Ferguson, 163 U.S. 537 (1896) 7
Shapiro v. Thompson, 394 U.S. 618 (1969) 2, 3, 6
Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) 4, 5, 7
Sosna v. Iowa, 419 U.S. 393 (1975) 2
United States v. Guest, 383 U.S. 745 (1966) 3, 4
Vlandis v. Kline, 412 U.S. 441 (1973) 2, 6

TREATISES, BOOKS, LAW REVIEWS AND OTHER AUTHORITIES

Chafee, *Three Human Rights In the Constitution of 1787* (1956) 4

IN DISTRIBUTING STATE OWNED RESOURCES TO ITS CITIZENS ON THE BASIS OF WHEN CITIZENSHIP WAS ACQUIRED, THE STATE OF ALASKA VIOLATES THE RIGHT TO FULL AND EQUAL CITIZENSHIP INHERENT IN THE RIGHT OF INTERSTATE MIGRATION

Appellants assert that the textual source for the emerging right of interstate migration is the first sentence of the Fourteenth Amendment, creating the right of United States citizens to become citizens in the state of their choice by establishing residency, the "citizenship clause." This right to become a state citizen precludes any state from making distinctions between its citizenry solely on the basis of when their citizenship was acquired.[1] The Fourteenth Amendment

---

[1]In all prior cases in which this Court has approved a durational residency requirement, that requirement has been for the purpose of providing objective indicia of the bona fides of domicile. This Court has never approved discrimination in which the classifying trait was, alone, the length of one's unquestioned citizenship. In *Sosna v. Iowa*, 419 U.S. 393 (1975), the most recent case to consider a durational residency requirement, it was made clear that the state's very legitimate and important concern over the integrity of its judgments justified imposition of the one year waiting period in order to ensure that the basis for jurisdiction, domicile, existed. *See* 419 U.S. at 407-08.

The Court in *Sosna* also observed:

> Nor are we of the view that the failure to provide an individualized determination of residency violates the Due Process Clause of the Fourteenth Amendment . . . [I]n *Vlandis* the Court warned that its decision should not "be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement."

419 U.S. at 409.

A decision in favor of appellants in this case would, similarly, in no way preclude the State of Alaska from establishing a reasonable durational residency requirement as part of the proof required to demonstrate bona fide domicile. What is a reasonable period is, itself, a constitutional question, resolution of which turns on a weighing of the importance of enjoyment of the benefit withheld against the state's interest in preventing fraudulent claims of domicile. *Compare Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), *with Vlandis v. Kline*, 412 U.S. 441, 452-53 & n. 9 (1973), and *Sosna v. Iowa*, 419 U.S. 393 (1975); *see Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

envisions equality of citizenship and not a hierarchy of citizens with long term residents at the top and new arrivals at the bottom.

The right of interstate migration, " 'freedom to enter and abide in any State in the Union,' " *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972), has at times been merged with and undifferentiated from the more general right to interstate travel. *Compare United States v. Guest*, 383 U.S. 745 (1966), *with Edwards v. California*, 314 U.S. 160 (1941). The right to enter and establish residency in a state was seen as synonymous with the right to travel through the state, and the source of the former right was thought inextricably linked to the source of the latter. See, *e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969).

In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), this Court explicitly noted the more specific nature of the right of interstate migration.

> [T]he right to travel was involved only in a limited sense in *Shapiro*. The Court was there concerned only with the right to migrate "with intent to settle and abide," or, as the Court put it, "to migrate, resettle, find a new job, and start a new life."

415 U.S. at 255 (footnotes omitted).

The right of migration has been considered by this Court as recently as last term, in *Jones v. Helms*, U.S. , , 101 S. Ct. 2434, 2439 (1981), in which the Court observed: "the right to travel from one state to another and to take up residence in the State of his choice is protected by the Federal Constitution." It went on, however, to sound a familiar refrain in litigation implicating the right to travel: "the textual source of this right has been the subject of debate . . ." *Id.*

The source of the right to travel has been variously identified as implicit in the nature of the federal union, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868); the commerce clause, *Edwards v. California*, 314 U.S. 160 (1941); the Fourteenth

Amendment's privileges and immunities clause, as an adjunct of national citizenship, *Edwards v. California*, 314 U.S. at 178-81; 182-84 (concurring opinions of Justices Douglas and Jackson); and "liberty" protected under the Fourteenth Amendment's due process clause, *United States v. Guest*, 383 U.S. 745, 769-71 (1966) (opinion of Justice Harlan, concurring in part and dissenting in part, citing Chafee, *Three Human Rights In the Constitution of 1787*, 192-93, 209 (1956)).

Interesting, and long overlooked, is the fact that in the first case ever to identify the right of migration as a distinct federally guaranteed constitutional right this Court carefully distinguished between the right to interstate travel, on the one hand, and the right of interstate migration, on the other. In construing the newly adopted Fourteenth Amendment, at a time when its "history is fresh within the memory of us all," *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 68 (1873), the Court first identified the right to interstate travel, citing *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868), as an implicit right of national citizenship protected by the Fourteenth Amendment's privileges and immunities clause. *Id.*, at 79. Justice Miller, writing for the majority, went on to note that the Fourteenth Amendment itself created a *new* substantive right, which he described as follows:

> It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.

Id. at 80.

Justice Bradley, dissenting in the *Slaughter-House Cases* on other grounds, also recognized that the Fourteenth Amendment created this new federal right to state citizenship:

> A citizen of the United States has a perfect constitutional right to go and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen . . .

83 U.S. at 112-13.

The specific textual source of this new right was identified by both Justices Miller and Bradley as the first sentence of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens* of the United States and *of the State wherein they reside.*" (Emphasis added.)

One recent decision of this Court has identified the source of the right of interstate migration as the right to establish state citizenship contained in the Fourteenth Amendment's first sentence. Justice Stewart, concurring and dissenting in *Oregon v. Mitchell*, 400 U.S. 112, 285 (1970), joined by Chief Justice Burger and Justice Blackmun, stated: "Freedom to travel from State to State — freedom to enter and abide in any State in the Union — is a privilege of United States citizenship." He then went on to quote the first sentence of the Fourteenth Amendment, the privileges and immunities clause, and the above-quoted statement by Justice Miller in the *Slaughter-House Cases* identifying the source of this new right as the Fourteenth Amendment's first sentence. *See Edwards v. California*, 314 U.S. 160, 182 (1941) (Justice Jackson, concurring) (semble).

Although not critical to appellants' case, recognizing the textual source of the right to interstate migration (as opposed to the more general right to travel), as the Fourteenth Amendment's first sentence is helpful in resolving the issues presented here because that sentence focuses directly on what the right of migration includes — the right to full, equal and undifferentiated citizenship in the state to which one migrates. Justice Miller, in his opinion in the *Slaughter-House Cases*, noted that this new federal grant of the power to acquire state citizenship through residency prohibited a state from establishing classes of citizenship because, he said, those claiming citizenship under the Fourteenth Amendment enjoy *"the same rights as other citizens of that state."* 83 U.S. at 80 (Emphasis added).

Later, in the same case, Justice Bradley continued:

> Citizenship of the United States ought to be, and, according to the constitution, is, a sure and undoubted title to

> equal rights in any and every State in this Union . . . If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.

83 U.S. at 113.

Justice Bradley was not setting out a sweeping notion of equal protection that would prevent a state from making distinctions between citizens based on neutral criteria unrelated to the nature or status of their citizenship, for example, need. He was simply observing that the citizenship which the new amendment guarantees is not to be citizenship of a different or lesser quality than those claiming state citizenship without the protection of the Fourteenth Amendment.

The right of interstate migration's demand for equality of citizenship is clearly reflected in this Court's consistent rejection of the "contribution rationale" as a preferred basis for favoring long-term citizens over more recent arrivals. In *Shapiro v. Thompson*, 394 U.S. 618, 632-33 (1969), the first case in which such a justification for differential treatment was offered, it was treated in the following strong terms:

> Appellant's reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

The Court repeated the above quotation from *Shapiro* in the next case in which the contribution rationale was offered, *Vlandis v. Kline*, 412 U.S. 441, 450 n. 6 (1973), and again in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 266 (1974), adding, "We rejected this 'contributory rationale' both in *Shapiro* and in *Vlandis v. Kline* . . ."

If, as appellants urge, the rights of interstate migration includes the right to full and undifferentiated citizenship, then Alaska's scheme classifying according to length of citizenship

violates both the right of interstate migration, itself, and the "fundamental rights" strand of equal protection. *See Dunn v. Blumstein*, 405 U.S. 330 (1972).

What this Court recognized in the *Slaughter-House Cases* and has consistently affirmed since is that the United States Constitution confers on all United States citizens the right to become a citizen of any state merely by establishing residency, *i.e.*, domicile in that state. *See Bradwell v. The State*, 83 U.S. (16 Wall.) 130, 138 (1873). Once citizenship is attained through residency, it is not partial, but full citizenship. All state owned resources are owned equally by all state citizens, no one citizen owning a larger share than any other. Should a state choose to distribute those resources based on the criterion of citizenship alone, as has Alaska, then each citizen is entitled to an equal share of the distribution.[2] As appellees acknowledge in their Brief, at 24, "qualification for participation in the dividend program is not need, *but the simple status of residency.*" (Emphasis added. See also *id.* at 28.)

Just as the equal protection clause directly forbids lawmakers from engaging in invidious discrimination, so also does the right to interstate migration directly forbid the State of Alaska from favoring its longer term citizens or residents over those who have more recently made their home there. The United States Constitution demands that Alaska recognize the full equality of all of its citizens.

As Justice Harlan stated, in dissenting in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), ". . . in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens . . . The humblest is the peer of the most powerful."

---

[2]Appellants do not advocate any distribution scheme. They simply assert that the existing one is unconstitutional.